Supreme Court, U.S.
FILED
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(1)

No.

In The
# Supreme Court of the United States

**DR. MELISSA WHITING,**
*Petitioner,*

v.

**UNIVERSITY OF SOUTHERN MISSISSIPPI;**
**DR. SHELBY THAMES,**
**OFFICIALLY AND INDIVIDUALLY;**
**DR. DANA THAMES,**
**OFFICIALLY AND INDIVIDUALLY;**
**DR. CARL MARTRAY,**
**OFFICIALLY AND INDIVIDUALLY,**
*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI
**with Appendix**

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September, 2006

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## QUESTIONS PRESENTED

If a public employee is in fact a "class of one", who has filed a claim directly against his decision-maker before a decision is made about the employee's continuing employment, can a literally perfect work record arbitrarily be ignored by the decision maker?

Whether in a "class of one" Equal Protection case, that involves personal animus, is a rational basis required to allow for the difference in treatment of one having a claim against a biased decision maker *vis a' vis* those similarly situated who do not?

If a public employee is provided an employee handbook as part of his contractual relationship that literally "guarantees" constitutional due process, is the lower court, via Summary Judgment, correct in holding that the public employee does not have an entitlement to Due Process?

Whether a public employee is entitled to the benefit of Annual Evaluations informing him that his work performance is virtually perfect? Can he be arbitrarily fired by a biased decision-maker without Due Process, without a hearing, and without being provided any reason for his firing?

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Fifth Circuit Court of Appeals include The University of Southern Mississippi, Dr. Shelby Thames, Dr. Dana Thames, Dr. Carl Martray, and the petitioner, Dr. Melissa Whiting. There are no parties to the proceedings other than those named in the petition.

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No. _____

**IN THE SUPREME COURT**
**OF THE UNITED STATES**

**DR. MEL[illegible]A WHITING,**
***Petitioner,***

**v.**

**UNIVERSITY OF SOUTHERN MISSISSIPPI,**
**DR. SHELBY THAMES officially and individually,**
**DR. DANA THAMES officially and individually,**
**DR. CARL MARTRAY officially and individually**
***Respondents.***

**On Petition For a Writ of Certiorari to the**
**United States Court of Appeals, Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

Petitioner, Dr. Melissa Whiting, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported as Whiting v. University of Southern Mississippi, Dr. Shelby Thames, Dr. Dana Thames, and Dr. Carl Martray, 451 F.3d 339 (5th Cir. 2006). It is reproduced in the Appendix. (Opinion, B1-B34). The opinion of the District Court granting Partial Summary Judgment is unreported. Its pertinent rulings from the bench are reprinted in the Appendix. (Bench Ruling, Apx F1-F36).

## JURISDICTION

The court of appeals judgment was entered on June 2, 2006. A timely petition for rehearing was denied on July 7, 2006. (Order, A1-A2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 1983 provides that: "Every person who, under color of any statute, ordinance, ...or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution...shall be liable to the party injured in an action at law..."

2. The Equal Protection Clause of the Fourteenth Amendment provides that a state shall not "deny to any person within its jurisdiction the equal protection of the laws."

3. The Due Process Clause of the Fourteenth Amendment provides that a state shall not "deprive any person of life, liberty, or property, without due process of law..."

## STATEMENT

Petitioner, Dr. Melissa Whiting, a public employee, seeks review of the ruling of the Fifth Circuit Court of Appeals that acknowledged that state employees have contractual rights and constitutional entitlements emanating from employee manuals and handbooks. However, the Fifth Circuit held that, irrespective of the "guarantee" of Due Process contained in the Faculty Manual, Dr. Whiting is not entitled to Due Process.

The Faculty Handbook in this case literally "guaranteed" Dr. Whiting **"Contractual Due Process"**. The specific contractual agreement, contained in the Faculty Manual, promised her:

> "Faculty personnel actions: **Procedure and Contractual Due Process**; "These procedures collectively constitute **contractual Due Process** - -the sum total of the procedural **guarantees** explicit and implicit..."

As this Court is more than well aware, cases involving issues of Due Process often involve whether one has an actual property interest or entitlement to Due Process. Here, USM "contractually" bound itself to provide Due Process. Furthermore, USM has acknowledged in depositions that Dr. Whiting was guaranteed

employment for a period of at least six years so that she could become fully tenured and promoted.

The Defendants, in their Annual Evaluations, assured Dr. Whiting, for six consecutive years, that she "far exceeded" standards for being tenured and promoted. The Defendants admitted in their depositions that the Annual Evaluations are the most important document that USM uses to inform a Professor as to whether he is meeting the criteria regarding tenure and promotion. In spite of the foregoing, the President of USM effectively terminated Dr. Whiting's employment and denied Dr. Whiting tenure and promotion in late August 2002. He did not provide her a hearing. He arbitrarily denied her both constitutional and contractual Due Process irrespective of the fact that she was guaranteed both. It should be emphasized that she was not guaranteed tenure, but she was guaranteed Due Process because the Faculty Manual "explicitly and implicitly" stated exactly that. Yet, the Fifth Circuit held she was not entitled to Due Process.

Additionally, Dr. Whiting was a "class of one" for several reasons: She filed a Complaint directly against Dr. Shelby Thames and spoke out about his misconduct regarding her before he terminated her. Moreover, her

direct supervisor was Dr. Shelby Thames' daughter, Dr. Dana Thames. Dr. Whiting had also filed a Complaint against Dana Thames and had been in an ongoing acrimonious academic struggle with Dana Thames before Dana's father terminated Dr. Whiting. Lastly, Dr. Whiting has spoken out regarding student rights.

It is undisputed that others with similar credentials as Dr. Whiting were tenured, or, at a minimum, received a Due Process hearing that the Employee Handbook guaranteed.

The Faculty Handbook also assured Dr. Whiting of decisions by certain deadlines. She did not receive this benefit either. This breach prevented Dr. Whiting from finding other employment for the coming academic year.

Shelby Thames provided no rationale for his decision. He referred to not one iota of some deficiency regarding Dr. Whiting's performance. Indeed, there was no deficiency, but, even if there were, Dr. Whiting relied upon the Annual Evaluations that emanated from the Faculty Handbook. These evaluations assured her that there was no deficiency to rectify.

The Provost, the chief of academics at USM, recommended in writing directly to Dr. Shelby Thames that

Dr. Whiting be tenured and promoted. The University's highest committee, the University Academic Affairs Committee, also endorsed her credentials and recommended her to be tenured.

The only "wrong" committed by Dr. Whiting is that she made an enemy of Dr. Dana Thames and her father, Dr. Shelby Thames.

Ultimately, Dr. Whiting was literally segregated and, finally, banned by Dana Thames to a separate building in an attempt to isolate Dr. Whiting. She is a classic "class of one".

The Defendants have conceded that they applied a different standard to Dr. Whiting than every other person who has been tenured and promoted. It is undisputed, or, in the alternative, genuinely disputed, that her qualifications for tenure and promotion greatly exceed those who have been tenured and promoted.

## REASONS FOR GRANTING THE PETITION

### I. The lower court has misinterpreted Village of Willowbrook v. Olech, 528 U.S. 562 (2000) and, consequently, undermines its actual holding.

In Olech the Supreme Court conclusively determined that our Constitutional Equal Protection Clause does protect a "class of one" where the plaintiff did not allege membership in a class or group. The Court recognized that:

> "Our cases have recognized successful equal protection claims brought by a "class of one", where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that **there is no rational basis for the difference in treatment. Id.. At p. 564.**

Furthermore, motive is not an element of proof. Those allegations, "quite apart from the village's **subjective motivation**" are sufficient to state a claim for relief under traditional equal protection analysis." Id. (emphasis supplied).

Here, where it is conceded the public employer applied a different standard to Dr. Whiting than other professors, and it is conceded she was a "class of one", the

lower court has added a criterion that this Court has not. Here, the lower court held that Dr. Whiting must, in addition to the foregoing Olech standard, also establish or negate whether there was any rational basis for the government's action. Whiting v. University of Southern Mississippi, et al, 451 F. 3d 339, 348 (5th Cir. 2006).

First, the state offered no basis for its decision. The Defendants never provided any rationale, much less a rational reason, for requiring Dr. Whiting to surpass others regarding credentials for becoming tenured. Thus, there was nothing to negate. The Defendants offered no reason for this difference in treatment. They never stated how this application of different standards benefited the State.

Secondly, neither motive nor a pretextual rational basis for a decision is pertinent to an equal protection contention predicated upon ill will or personal animus. Indeed, Olech, echoed what is actually an enduring constitutional principle. In Yick Wo v. Hopkins, 118 U.S. 356, 369-70 (1886), the Supreme Court made it clear that it is repugnant to our Constitution to allow an "evil eye" or an "unequal hand" to be applied by public authority, based upon mere dislike, because this approach made for unjust class distinctions Id.:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that **they do not mean to leave room for the play and action of purely personal and arbitrary power."** Id. (Emphasis added).

Here, we have a professor who did everything right. Her only wrong was irritating the daughter of President Thames and President Thames. Both of these people were Dr. Whiting's supervisors. She clearly did not please President Thames by filing a Complaint against his daughter and him.

The "singling out" of a person for "abnormal" treatment, such as here, entitles that person to bring a civil action for denial of Equal Protection. One test for whether an action is arbitrary in a university setting is whether "it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." Regents of University of Michigan v. Ewing, 474 U.S. 214, 225 (1985).

Here, a brief summary of substantial departures" is provided:

A. She was deprived of continuing employment for at least one year. Indeed, since she did not receive Dr. Thames letter regarding a terminal contract until after September 1, according to the Handbook, she was entitled to two more years – irrespective of her tenure status.

B. She was deprived of employment elsewhere because the May 1 deadline was surpassed by a four month delay. Only after she complained to the public about his daughter and him, via a lawsuit, did he act at all.

C. Dr. Thames did not act until the school year had begun, and Dr. Whiting had already been replaced.

D. Dr. Thames provided no reason to Dr. Whiting as to why she was being terminated. He had no criticisms of her when he was deposed. He had no notes or negative notations about her.

E. Dr. Thames expressed no reason why he ignored: the recommendation of his Provost [in charge of academic affairs]; the hearing result of the University Advisory Committee that voted in favor of tenure; Departmental view favoring Dr. Whiting; favorable Third Year Review; and virtually perfect Annual Evaluations.

F. All others, with the same or less accomplishments than Dr. Whiting, were tenured.

Ultimately, what is important is that the lower court did not apply the Equal Protection test that this Court directed it to apply. Olech does not require proof of motive, and the lower court added that criterion anyway. This undermines this Court's ruling in Olech. Consequently, this Petition for a Writ of Certiorari should be granted.

## II. The Decision below creates a split in the Circuits.

The lower court added a criterion regarding a "class of one" Equal Protection case that conflicts with this Court's ruling in Olech, supra, as well as other circuits. Here, we are not involved with suspect classifications or other groups held to be vulnerable as a group. This case involves bias, personal animus, and ill will. It is a classic Olech case. Yet, the lower court opined that, even in an "animus" Equal Protection case, such as this one, one must prove [or disprove or negate] whether there is a rational basis for the state action. That is not the holding in the Sixth Circuit. Klimik v. Kent County Sheriff's Dept., 91

Fed. Appx. 396, 399-401 (6th Cir. 2004). That is not the holding in the tenth circuit. *See*, Bartell v. Aurora Public Schools, 263 F.3d 1143, 1149 (10th Cir. 2001).

In the Ninth Circuit, it is evident that its rulings conflict with this Fifth Circuit ruling because it has previously concluded, where state action does not implicate a fundamental right or a suspect classification, the plaintiff can establish a "**class** of **one**" equal protection claim by showing that he or she has been intentionally treated differently than others similarly situated, and there is no rational basis for the different treatment. Sea River Mar. Fin. Holdings, Inc. v. Mineta, 309 F.3d 662, 679 (9th Cir. 2002). Squaw Valley Development Co. v. Goldberg, 375 F.3d 936, 944 (9th Cir. 2004).

Please note the test in these circuits follows Olech. It is a straightforward application of there being a rational basis for difference in treatment – not a rational basis for the government's action.

The Ninth Circuit has held, even if [unlike here] there was a stated rational basis for the unequal treatment, that proffered basis can be shown to be pretextual if the defendants were motivated by malignant animosity. Squaw Valley at pp. 944-948. It is a matter that presents a question

of fact for a jury to resolve – not Summary Judgment. The plaintiff must show that the defendant's conduct was motivated by animus and that the state's proffered "rational" reason was pretextual. Id. Here, this approach was not followed.

Some Circuits hold that a plaintiff must only show an arbitrary difference in treatment as well as ill will or animus against the plaintiff. Jennings v. City of Stillwater, 383 F. 3d 1199, 1210-11(10th Cir. 2004); Harlen Assoc. v. Inc. Vill. of Mineola, 273 F.3d 494, 499-500 (2nd Cir. 2001); Williams v. Pryor, 240 F.3d 944, 951 (11th Cir. 2001).

The Second Circuit has explained that to bring a claim under Olech, "plaintiffs can recover if they can show that they were treated differently from similarly situated [persons], . . . and that there was 'no rational basis for the difference in treatment.'" Cobb v. Pozzi, 363 F.3d 89, 110 (2nd Cir. 2003) (*quoting* Olech, 528 U.S. at 564).

Consequently, when the foregoing Circuits are considered, this lower court's decision causes a split in the Circuits because the effect of its ruling is to make motive an issue and to add a criterion regarding a rational basis for the state's action. The question becomes, "When there is a

genuinely disputed fact as to whether one is being "singled out" and subjected to animus or ill will, is one, in an Equal Protection context, entitled to a jury to resolve that issue?"

Here, the state produced no evidence or rationale for the difference in treatment. However, even if the state conjured up a "rationale" for its treatment of Dr. Whiting, [and ignoring her perfect credentials and "far exceeding" the criteria and ignoring her "contractual due process guarantees"], this is a genuinely contested issue that should not be the victim of summary judgment. As the other circuits, as described supra, have held, Dr. Whiting is entitled to put on her proof about animus and ill will and personal vindictiveness.

Consequently, the Court should grant this Petition for Writ of Certiorari so that the foregoing split in the circuits can be addressed and eliminated.

## III. THE DECISION IN THE COURT BELOW UNDERMINES THIS COURT'S DECISION IN Vitarelli v. Seaton, 359 U.S. 535, 547 (1959) AND Bishop v. Wood, 426 U.S. 341 (1976).

The Fifth Circuit's decision undermines the impact of Bishop v. Wood, 426 U.S. 341 (1976) and Vitarelli v. Seaton, 359 U.S. 535, 547 (1959) with regard to the

property rights and entitlements triggered when a public employee is provided an employee manual.

Bishop v. Wood directs the federal courts, when evaluating a Due Process claim, to refer to state law so that it can be determined if one has a property right or entitlement deserving of Due Process constitutional protection. Furthermore, Vitarelli v. Seaton, 359 U.S. 535, 547 (1959) holds that a public employer, such as USM, is to "scrupulously" adhere to representations in its handbooks regarding procedures and rules. Vitarelli v. Seaton, 359 U.S. 535, 547 (1959).

Here, as shown above, the Faculty Handbook "guaranteed" Dr. Whiting "Procedural and Contractual Due Process" – both " explicit and implicit". However, she received literally zero Due Process [no hearing whatsoever before the decision maker].

The lower court's ruling makes open to question whether, in order to determine a property right, one must do something more than apply state law. This notion could very well create conflict among the circuits and undermine the obvious significance of Bishop v. Wood, supra.

In Mississippi contractual rights and, specifically, employee manuals do constitute property rights. *See e.g.*,

Univ. of Miss. Med. Ctr. v. Hughes, 765 So. 2d 528, 536 (Miss. 1988); Robinson v. Bd. Of Trustees, 477 So. 2d 1352-53 (Miss. 1985); Bobbitt v. The Orchard Dev. Co., 603 So. 2d 356, 361 (Miss. 1992). However, the lower court did not follow the acknowledged constraints articulated and held in Bishop v. Wood, supra. If it had, the "guarantee" of Due Process in the Faculty Manual should effect just that. Instead, the lower court held that Dr. Whiting was not entitled to Due Process. This holding is in direct conflict with Bishop v. Wood, supra, that insists and mandates that property interests and entitlements are determined by state law. In Mississippi state law demands that the "guarantee" of Due Process be implemented. Yet, it was not.

Additionally, this High Court has held that a public agency, when dealing with a public employee such as Dr. Whiting, "must be rigorously held to the standards by which it professes its action be judged." Vitarelli v. Seaton, 359 U.S. 535, 547 (1959) (Frankfurter, J., concur and dissent). A public entity's written procedures must be "scrupulously observed." Id.

Consequently, the lower court's decision conflicts and undermines Vitarelli. Indeed, it concluded, in spite of

the fact that the Faculty Handbook guaranteed Due Process, that Due Process did not have to be provided Dr. Whiting. The procedures and standards provided in the Faculty Handbook have not been "rigorously" or "scrupulously" followed as this Court has directed in Vitarelli, supra.

Consequently, in order to avoid the undermining of Bishop and Vitarelli, supra, certiorari should be granted.

## IV. The Court of Appeals' Decision Undermines this Court's Decision in Gibson v. Berryhill, 411 U.S. 564, 569 (1973) that essentially holds that there is no Due Process if the Decision Maker is biased.

It is undisputed that there was substantial evidence that Dr. Shelby Thames and his daughter, Dr. Dana Thames, were biased against Dr. Whiting because, among other reasons, Dr. Whiting had filed claims against both of them **before** a decision regarding Dr. Whiting had been made by the decision-maker, Dr. Shelby Thames.

The basic requirement of constitutional Due Process is a fair and impartial tribunal, whether at the hands of a court, an administrative agency or a government hearing officer. Gibson v. Berryhill, 411 U.S. 564, 569, 36 L.Ed.2d 488, 93 S.Ct. 1689 (1973).

Further, even the Fifth Circuit has previously recognized that the Supreme Court has consistently enforced the basic procedural right to an unbiased decision-maker and held that decision makers are constitutionally unacceptable in the following circumstances: (1) where the decision maker has a direct personal, substantial, and pecuniary interest in the outcome of the case; (2) **where an adjudicator has been the target of personal abuse or criticism** from the party before him; and (3) when a judicial or quasi-judicial decision maker has the dual role of investigating and adjudicating disputes and complaints. Valley v. Rapides Parish School Board, 118 F.3d 1047 (5th Cir. 1997). *See* Baran v. Port of Beaumont Navigation Dist. of Jefferson County, 57 F.3d 436, 444-46 (5th Cir. 1995).

Here, we have the very anathema that both this Court and, ironically, even the Fifth Circuit have previously found to be constitutionally repugnant. It is undisputed that Dr. Whiting had made Dr. Shelby Thames the target of criticism. He had literally taken no action regarding her case for four months past the deadline for doing so. Then, he terminated her without a hearing that she was both contractually and constitutionally entitled. Yet, the Fifth

Circuit in this case did not find that a constitutional violation occurred.

Consequently, Berryhill, supra, is undermined. This petition should be granted so that this court's rulings regarding one's constitutional right to an unbiased decision-maker are not undermined.

## CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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# APPENDIX

**FIFTH CIRCUIT:**

Order Denying Petition for Rehearing,
filed 07/07/06 ..... A1 - A2

Opinion,
filed 06/02/06 ..... B1 - B34

Judgment,
filed 06/02/06 ..... C1 - C2

**SOUTHERN DISTRICT OF MISSISSIPPI:**

District Court Order,
filed 09/28/04 ..... D1 - D2

District Court Judgment,
filed 09/28/04 ..... E1 - E1

Bench Ruling of Hon. Ivan Lemelle,
filed 09/13/04 ..... F1 - F36

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

**No. 04-60956**

FILED
July 7, 2006

Charles R. Fulbruge, III,
Clerk

**MELISSA WHITING**

**Plaintiff - Appellant**

**V.**

**UNIVERSITY OF SOUTHERN MISSISSIPPI; SHELBY THAMAS, Dr.; DANA THAMES, Dr.; CARL MAS TRAY, Dr.**

**Defendants - Appellees**

**Appeal from the United States District Court for the Southern District of Mississippi, Hattiesburg**

**Filed: July 7, 2006**

**ON PETITION OR REHEARING**

Before HIGGINBOTHAM, WIENER, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ James L. Dennis
United States Circuit Judge

REHG-2

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES
41 FOR STAY OF THE MANDATE

**UNITED STATES COURT OF APPEALS**
**For the Fifth Circuit**

**No. 04-60956**

FILED
June 2, 2006
Charles R. Fulbruge, III,
Clerk

**MELISSA WHITING,**

**Plaintiff-Appellant,**

**VERSUS**

**THE UNIVERSITY OF SOUTHERN MISSISSIPPI;**
**SHELBY THAMAS, Dr.;**
**DANA THAMES, Dr.; CARL MASTRAY, Dr.;**

**Defendants-Appellees**

**Appeal from the United States District Court**
**For the Southern District of Mississippi**

**Filed: June 2, 2006**

Before HIGGINBOTHAM, WIENER, and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:

Dr. Melissa Whiting was a non-tenured professor at the University of Southern Mississippi ("USM"), whose annual evaluations and third-year review were consistently excellent. Nonetheless, she was denied tenure and promotion at the end of her sixth year at USM after

participating in the tenure application process laid out in the Faculty Handbook. Dr. Whiting alleges that the denial arose from ill will between her and her department chair, Dr. Thames, the daughter of the USM president. Accordingly, Dr. Whiting sued on several constitutional claims under 42 U.S.C. § 1983 and on state law-based contracts issues. The district court dismissed the constitutional claims on a motion for summary judgment and remanded the state-law claims to state court. Dr. Whiting now appeals.

Because Dr. Whiting has failed to establish genuine questions of material facts for key elements of her due process, equal protection, and First Amendment retaliation claims under 42 U.S.C. § 1983, we affirm the district court's motion for summary judgment.[1] As the only issues remaining are therefore questions of state contract law, we find no abuse of discretion in the district court's order remanding those claims to state court.

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[1] Appellees also argue that they are not parties susceptible to suit under § 1983. Because Dr. Whiting has clearly failed to establish constitutional claims valid under § 1983, we do not address this issue.

## BACKGROUND

In September 1996, Dr. Melissa Whiting became an assistant professor in the Department of Curriculum, Instruction, and Special Education in the College of Education and Psychology at USM. In May 1997, the Board of Trustees of the State Institutions of Higher Learning approved her for tenure-track status. From 1996-2002, Dr. Whiting and the Board executed nine-month employment contracts for each of the six academic years that fell during that period. Those contracts state that they are subject to the "laws of the State of Mississippi and the policies and bylaws of the Board."

As a member of the USM faculty, Dr. Whiting received the Faculty Handbook and the College of Education and Psychology Policy and Procedures for Tenure and Promotion. These handbooks contain language that notes "these procedures collectively constitute contractual due process -- the sum total of the procedural guarantees explicit and implicit [in the tenure process]." The Faculty Handbook further provides for annual evaluations and, for tenure-track faculty, a third year review. The Handbook also states that successful tenure reviews neither promise nor guarantee eventual tenure,

which is only obtained by discretionary grant of the Board of Trustees. The Faculty Handbook also states that decisions regarding tenure are normally communicated to the applicant by May 1.

During her time at USM, Dr. Whiting received five annual evaluations, and in each received the highest marks in the categories of teaching, research, and service. These same categories are used as criteria in evaluating suitability for tenure and promotion. Defendants Dr. Dana Thames and Dr. Carl Martray prepared, reviewed, and/or signed each annual evaluation. Dr. Whiting also underwent a third year review, based on the same criteria, and again received top marks in the above categories.

At the beginning of her sixth year of employment, Dr. Whiting submitted herself for consideration for both tenure and promotion (to associate professor). As part of the process, she submitted a dossier documenting her suitability for tenure and promotion. The dossier focused on the three major areas highlighted in her prior evaluations: teaching, scholarship and publication (research), and service. Dr. Whiting alleges that her department chair, Dr. Thames, intentionally provided Dr. Whiting with flawed advice, ordering her not to include

certain research materials in her dossier. Dr. Whiting further alleges that during the tenure process Dr. Thames and another faculty member, Dr. Reeves, "began a quest to scuttle [her] career," by intimating that Dr. Whiting had committed academic fraud. Dr. Whiting further alleges that Dr. Thames sought to isolate Dr. Whiting through departmental cliques and by placing her in a separate building from the rest of the faculty. She also alleges that Dr. Thames was displeased by Dr. Whiting's remarks about student rights that reflected poorly on Dr. Thames' administration of the department.

USM's review of Dr. Whiting's application began with a committee of faculty from her department. At their meeting, questions arose over certain articles listed in the publication section of her dossier. The committee chair and Dr. Thames met with Dr. Whiting and requested a written response to these questions. Dr. Whiting submitted her response, including an explanation of the methodology and analysis used to write several of her published articles. After the committee reconvened and considered her response, it voted to award promotion, with six in favor, three against, and two abstentions. The committee voted against awarding tenure, however, with six against, four in

favor, and one abstention. The committee's summary report notes a general agreement that Dr. Whiting wait to request tenure until she had completed her sixth year of teaching (a tenure candidate may request deferral of the tenure process until the seventh year of employment).

Both the committee chair and Dr. Thames notified Dr. Whiting by separate letter of the committee's conclusions and suggested that she consider withdrawing her request for early tenure. Dr. Thames prepared a written recommendation to the Dean of the College of Education and Psychology, Dr. Carl Martray, regarding the committee's decisions. In that report, Dr. Thames expressed her agreement with the committee's concerns, but informed him that Dr. Whiting still wished to move forward with both the tenure and promotion processes.

Dr. Whiting's dossier, as well as the recommendation to Dean Martray and a rebuttal letter from Dr. Whiting, came before the College Advisory Committee ("CAC"), a group of representatives from each department in her College. The CAC noted the disparity between Dr. Whiting's high marks in her annual evaluations and the "more negative" report of the tenure and promotion committee. After undertaking its own review of Dr.

Whiting's credentials, the CAC concluded "that it appeared that the annual evaluations of the chairs in the past were more optimistic than the credentials justified during many of the years." The CAC's report noted concerns that Dr. Whiting's body of work at that time "was not adequate and did not meet college research standards." The CAC voted to deny tenure and promotion, each vote tallying to four against and two in favor, with no abstentions. Dean Martray reviewed the CAC recommendations and Dr. Whiting's dossier, concluding that he had "no compelling reason to recommend against the CAC's determination." He transmitted Dr. Whiting's materials to the Provost, without recommendation for either promotion or tenure. Dean Martray notified Dr. Whiting of his decision and included the copies of the CAC's reports, reminding her that she retained the option to withdraw her application and request deferral to her seventh year.

Dr. Whiting chose to continue with the promotion and tenure process. Accordingly, her dossier came before the University Advisory Council ("UAC"). The UAC met twice to review her materials. On the advice of her attorney, Dr. Whiting declined invitations to attend these meetings, and presented UAC members with a letter

alleging failures of due process and violation of her due process rights under the Fourteenth Amendment. Ultimately, the UAC voted to award tenure (five voted in favor, three against, and one recusal), but did not reach a conclusion as to promotion (four in favor, four against, and one recusal). Those votes, in addition to another supplementary letter from Dr. Whiting, were then submitted to the Provost, who concurred with the UAC's recommendation as to tenure, and further recommended promotion. He notified Dr. Whiting of his recommendation by letter on May 17, 2002.

Dr. Whiting's dossier thus came before University President Shelby Thames, father of Dr. Dana Thames, who had taken that office on May 1, 2002. On August 23, 2002, President Thames wrote to request a meeting with Dr. Whiting to discuss concerns about her application. Dr. Whiting chose not to meet with President Thames. On August 30, 2002, President Thames wrote to Dr. Whiting to inform her that he would not recommend her to the USM Board of Trustees for tenure or promotion. That letter further gave notice that Dr. Whiting's employment at USM would not be renewed after the academic year ending May 2003.

Dr. Whiting appealed to the Board of Trustees on September 16, 2002. In forwarding her request to the Board, the Commissioner of Education recommended that the Board decline to consider the appeal. The Board did so unanimously, because Dr. Whiting had already filed suit, and notified Dr. Whiting of its decision by letter to her attorney on November 21, 2002.

## PROCEDURAL HISTORY

On August 6, 2002, Dr. Whiting filed the instant suit in the Circuit Court of Forrest County, Mississippi. Dr. Whiting complained of violations of her constitutional rights, as protected by section 1983 of the Civil Rights Act, claiming deprivation of substantive and procedural due process, and of rights guarded by the Equal Protection clause and the First Amendment.[2]

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[2] 42 U.S.C. § 1983 allows suit against any person who "who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

She also raised breach of contract and other claims under state law. She sought punitive damages, injunctive relief, and any other relief, including attorneys' fees, to which § 1983 entitled her.

Defendants timely removed to federal court, and moved for summary judgment on September 13, 2004. The district court granted the motion as to all federal claims, remanding the remaining state-law claims to state court. Dr. Whiting appeals both the award of partial summary judgement and the remand of the state-law claims.

## STANDARD OF REVIEW

This court reviews the district court's summary judgment ruling de novo. Hanks v. Transcon. Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). Summary judgment is appropriate where the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Facts and inferences reasonably drawn from those facts should be taken in the light most favorable to the non-moving party. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 456 (1992); Huckabay

v. Moore, 142 F.3d 233, 238 (5th Cir. 1998). Where the non-moving party fails to establish "the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," no genuine issue of material fact can exist. Celotex, 477 U.S. at 322-3.

Where a case is before the court under federal question jurisdiction, pendent-claim jurisdiction over state law claims exists where there is a "common nucleus of operative fact." United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966). While the federal courts have power to hear cases in such circumstances, they may exercise discretion over whether or not to exert that power. Id. at 726. Consequently, this court reviews the district court's remand of the state law claims for abuse of discretion.

**DR. WHITING'S § 1983 CLAIMS**

Dr. Whiting asserts due process, equal protection, and First Amendment claims through 42 U.S.C. § 1983. As she fails in each instance to establish a genuine issue of material fact on various elements of these claims, the district court properly granted summary judgment on all of her 42 U.S.C. § 1983 claims.

A. Due Process Claims

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 566-7 (1972). Similarly, substantive due process offers protection to an individual only if that person has either a "constitutionally protected property interest," Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 222 (1985), or a similarly protected liberty interest. Kelley v. Johnson, 425 U.S. 238, 244 (1976). To determine whether either procedural or substantive due process safeguards apply, we must examine the interest at stake to determine whether it falls within the Fourteenth Amendment's protections. Id. at 571.

i. Protected Property Interest

"The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." Roth, 408 U.S. at 576. The person must have a legitimate claim to those benefits, not simply an abstract need or unilateral desire. Id. To determine if property rights

exist, the court must look to state law. Id. at 578; see also, Bishop v. Wood, 426 U.S. 341, 344 (1976) (discussing the issue in the specific context of employment law).

Mississippi law is clear that neither state legislation nor state regulations create a legitimate expectation of continued employment for a non-tenured faculty member:

> Section 37-101-15(f) [Miss. Code Ann.]...empowers the Board of Trustees to terminate employment contracts at any time for malfeasance, inefficiency or contumacious conduct, but does not create a legitimate expectation of continued employment for a non-tenured employee.
>
> Just as there is no protected interest which arises from Mississippi statutes, there is none which arises from state regulations.
>
> Nor does the written tenure policy of MVSU create or confer an expectation of continued employment.

Wicks v. Miss. Valley State Univ., 536 So.2d 20, 23 (Miss. 1980) (internal citations omitted). Furthermore, the Mississippi Supreme Court has held that positive annual reviews do not serve to generate a property interest in tenure. Id. at 24 (citing Staheli v. Univ. of Miss., 854 F.2d, 121, 126 (5th Cir. 1988)).

Dr. Whiting argues, however, that the tenure procedures in the handbook state that if, in her annual evaluations and third year review, she meets or exceeds the criteria used for evaluation, then "she is to be tenured." Appellant's Brief at 21. This flat guarantee, she asserts, is sufficient to create a property interest. Language in the Faculty Handbook, however, consistently reiterates that promotion and tenure are not guaranteed, even by positive performance reviews: the Handbook states, for example, "[p]romotion in academic rank is not guaranteed by contracted employment or earned solely by the duration of employment" and "[t]he privilege of tenure is not guaranteed by tenure-track appointment, by prior promotion in academic rank, or by duration of employment." Further, as the district court noted: "the same faculty handbook reiterates that, notwithstanding the procedures, tenure is awarded at the discretion of the board of trustees upon nomination by the president." Given such language and existing state law precedent, we cannot construe an expectation of continued employment sufficient to generate a protected property interest.

Since Dr. Whiting's interest in her continued employment does not make for a viable due process claim,

she may only claim a due process violation if she has some other property interest in a benefit afforded by her current contract with the state university. A mere breach of contract will not suffice for an action under § 1983 without a violation of due process rights. Bishop, 426 U.S. at 349-350. While a plaintiff may have an action in state court for damages for breach of contract, he may not sue under § 1983 unless his constitutional rights have in some way been denied or his exercise of those rights penalized in some way. Id.

Dr. Whiting argues that she has been deprived of the property interest arising from her contractual right to the promotion and tenure procedures laid out in the handbook. Again, to determine if property rights exist, the court must look to state law. Mississippi courts have held that contract rights constitute enforceable property rights. Univ. of Miss. Med. Ctr. v. Hughes, 765 So.2d 528, 536 (Miss. 2000) (citing Wicks, 536 So.2d at 23 (Miss. 1988)). "[I]t is federal constitutional law[, however,] which determines whether that property interest rises to the level of a constitutionally protected interest." Hughes, 765 So.2d at 536. Certain contract situations, however, such as a "public college professor dismissed from an office held

under tenure provisions," or "staff members dismissed during the terms of their contracts," have contractual rights creating "an interest in continued employment that [is] safeguarded by due process." Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 566-7 (1972) (citing respectively, Slochower v. Bd. of Education, 350 U.S. 551 (1956), and Wieman v. Updegraff, 344 U.S. 183 (1952)).

Mississippi courts have held that employee manuals become part of the employment contract, creating contract rights to which employers may be held, such as Dr. Whiting's right to the procedures outlined in the handbooks. Robinson v. Bd. of Trustees of E. Cent. Junior Coll., 477 So.2d 1352, 1353 (Miss.1985); see also, Bobbitt v. The Orchard Dev. Co., 603 So.2d 356, 361 (Miss. 1992). The 5th Circuit has held that where a property right to procedural protections existed under state law, those procedural guarantees constituted a property interest protected under due process. Samuel v. Holmes, 138 F.3d 173, 177 (1998) (analyzing a non-tenured employee's claim where a Louisiana statute directed school districts to promulgate policies for dismissal of such employees; claimant had property interest in procedural guarantees). However, even if Dr. Whiting's contractual rights are

sufficient to constitute a property interest warranting due process protection, it is not clear that she has adequately alleged any sort of deprivation. Indeed, reviewing the history of her tenure application suggests that she has been afforded the processes guaranteed her.

Potential deficits arise in three areas. First, Dr. Whiting alleges that "[s]he [was] entitled to a presidential decision by May 1 [of 2002, the end of the academic year in which she applied for tenure]" but that the President did not reach a decision until late August 2002. The Faculty Handbook, however, states "Presidential decisions are normally communicated to affected parties by May 1." The word "normally" suggests that there may be times at which circumstances mandate a different date may apply: in this case, President Thames did not assume office until May 1, 2002; furthermore, the provost's review was not itself completed until May 17, 2002.

Second, Dr. Whiting argues that the policies laid out in the Faculty Handbook create an "automatic" process, guaranteeing tenure to one who meets or exceeds the criteria applied during annual and third-year reviews. Because the handbook's procedures are incorporated into her contract, her contract rights warrant due process

protection, and she has met or exceeded the criteria, Dr. Whiting argues she is therefore contractually guaranteed tenure. This argument fails for reasons already discussed supra: the language in the Faculty Handbook emphasizes that the ultimate decision for tenure lies in the Board's hands, and that positive evaluations do not guarantee a grant of tenure.

Third, Dr. Whiting argues that the tenure and promotion procedures create a de facto tenure program such that she has a protected interest in her continued employment. She relies on Perry v. Sindermann, in which the Supreme Court held that "[a] teacher...who has held his position for a number of years, might be able to show from the circumstances of this service--and from other relevant facts--that he has a legitimate claim of entitlement to job tenure" such as would support a due process claim, even though the state college at which he was employed had no formal tenure program. 408 U.S. 593, 602 (1972). Dr. Whiting's case, however, is distinguishable from the facts of Perry: USM clearly has a formal tenure process, and as discussed above, emphasizes that the final decision on tenure remains at the discretion of the Board of Trustees, notwithstanding the results of annual and third-year

evaluations. Thus her argument arrives at the same result as above: where a tenure policy exists, non-tenured university employees under Mississippi law do not have a property interest in their continued employment that warrants protection under the due process clause.

Dr. Whiting therefore fails to establish a genuine question of material fact as to whether she has been deprived of any property interest. Accordingly, her due process clause claims, both substantive and procedural, fail insofar as they are based on deprivation of a property interest.

ii. The Protected Liberty Interest Claim

Protected liberty interests include the freedom to work and earn a living. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972). "There [may] be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated." Id., 573. To determine if a public employee has been deprived of a protected liberty interest, this court must find that he was either:

> terminated for a reason which was (i) false, (ii) publicized, and (iii) stigmatizing to his standing or reputation in his community or

> [] terminated for a reason that was (i) false and (ii) had a stigmatizing effect such that (iii) he was denied other employment opportunities as a result.

Cabrol v. Town of Youngsville, 106 F.3d 101, 107 (5th Cir. 1997) (citing Bd. of Regents of State Colls., 408 U.S. at 564; Codd v. Velger, 429 U.S. 624, 627, 628, (1977) (per curiam); Moore v. Miss. Valley State Univ., 871 F.2d 545, 549 (5th Cir. 1989); Wells v. Hico I.S.D., 736 F.2d 243, 256-57 (5th Cir.1984).

The district court found that Dr. Whiting had been accused of academic fraud; the veracity of that accusation is central to this suit. Neither party disputes that such an accusation would have a stigmatizing effect for a university professor.

Dr. Whiting alleged that she had lost job opportunities due to the denial of tenure, but, as the district court noted, did not (and does not) allege that she lost the opportunities because of the false and or stigmatizing information contained in her file. As we have stated before, "[w]hile it is generally understood that the loss of a job can be stigmatizing in itself, the law requires more to find a liberty deprivation." Cabrol, 106 F.3d at 107 (citing Wells, 736 F.2d at 258).

Dr. Whiting does argue that she has suffered a reputational loss within her community; viz., USM. The question is whether she has raised a genuine question of material fact as to whether the accusations were publicized. To avoid summary judgement based on appellant's argument, Dr. Whiting must show that "'the governmental agency has made or is likely to make the...stigmatizing charges public "in any official or intentional manner, other than in connection with the defense of [the related legal] action.'"" Wells v. Hico I.S.D., 736 F.2d 243, 255 (5th Cir. 1984) (quoting Ortwein v. Mackey, 511 F.2d 696, 699 (5th Cir. 1975)). This court has previously held that,

> the mere presence of defamatory information in confidential personnel files does not amount to a violation of one's liberty rights. See Walker v. Alexander, 569 F.2d 291, 294 (5th Cir.1978); Ortwein v. Mackey, 511 F.2d 696, 699 (5th Cir.1975); Sims v. Fox, 505 F.2d 857, 864 (5th Cir.1974) (en banc), cert. denied, 421 U.S. 1011(1975). However, where the information contained in the allegedly confidential files is clearly false, and there is a possibility that the information will not be kept confidential, we have held that an evidentiary hearing is required to determine the issues of confidentiality and the potential prejudice to the plaintiff's standing in the

> community and to his employment opportunities. Swilley v. Alexander, 629 F.2d 1018, 1022 (5th Cir. 1980).

Burris v. Willis Indep. Sch. Dist., Inc., 713 F.2d 1087, 1092 (5th Cir. 1983).

Dr. Whiting claims that adequate publication had occurred via preparation of transcripts and cites the record in stating that Defendants concede that at least 30 people, all of whom were participants in the tenure and promotion process, heard the allegation during the tenure and promotion process. She also argues that no evidence has been offered to suggest that those thirty people were in any way precluded from discussing the accusation. Furthermore, she argues, the information had been placed in her file, leaving it accessible to other potential employers, and the information "spread by Dana Thames through the Department, the College, and the University." In her deposition, however, Dr. Whiting concedes that although she had discussed the facts of her suit with people outside of USM, she had no knowledge of whether defendants had discussed her case with anyone outside of the tenure and promotion process.

Any distribution of the information regarding the charges against Dr. Whiting thus seems confined to the

setting in which they were made - the hearings for the tenure process - and to Dr. Whiting's personnel file. Dr. Whiting does not point to any concrete manner in which defendants have published or will publish, in an official or intentional manner, the alleged accusations outside of the various tenure committees. Cf., Burris, 713 F.2d 1087, 1092-3 (5th Cir. 1983). Furthermore, in her deposition Dr. Whiting denied any knowledge that the defendants had disseminated the charges against her outside of the tenure process. Dr. Whiting therefore has not created a material question of fact as to whether the defendants acted in any official or intentional manner to publicize the alleged accusations regarding academic fraud.

Dr. Whiting thus does not meet the requirements that warrant finding deprivation of a liberty interest. Since she cannot assert that claim, nor claim deprivation of a property interest, the District Court correctly granted summary judgment against her on her due process claims.

B. The Equal Protection "Class of One" Claim

Under the standard set out in Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000), for a "class of one" claim to withstand summary judgment, Dr. Whiting must have

established genuine questions of material fact as to whether 1) "she was intentionally treated differently from others similarly situated" in the tenure process and 2) if different standards for tenure were applied, "that there [was] no rational basis for the difference in treatment."[3] Id. at 564.

In support of her claim, Dr. Whiting reviewed the CVs of other professors who had traversed the process and received tenure at USM. She argues that her dossier documents a far greater array of accomplishments than possessed by others who had received tenure. All but two of these professors, some of whom belonged to other departments of the university, had gone through the tenure process at different times, were evaluated by different committees, and sought different positions than Dr. Whiting. Of the remaining two, one came from a different department, and the other worked in a different area of teaching and research. Dr. Whiting does not contest that both she and other tenure applicants are evaluated under the three handbook criteria of teaching, research, and service. Instead, she argues that those individual criteria were

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[3] Rational basis scrutiny is used because Dr. Whiting does not contend that she is a member of a suspect or protected class. Delahoussaye v. City of New Iberia, 937 F.2d 144, 149 (5th Cir. 1991).

applied differently to her such that she had to meet a different set of requirements.

To evaluate her arguments, we must first determine whether or not Dr. Whiting, in her CV review, trawled a pool of similarly situated individuals. She argues that acceptable breadth of comparison is wide, encompassing all faculty at the university who apply for tenure at USM at any time, as all are subject to the same procedures and criteria for tenure. Appellees, by contrast, argue that applicants who underwent tenure evaluation at a different time, in a different field of expertise, are not thought of as similarly situated to Dr. Whiting given the wide-ranging differences in what might constitute, for example, consistently high quality research within different disciplines or at different points in USM's history. The argument seems to narrow the field too finely, however.

Precedent from this court suggests that at somewhat broader scope is more appropriate. See, e.g., Levi v. Univ. of Tex. at San Antonio, 840 F.2d 277, 280 (5th Cir. 1988) (in which the court accepts without argument that two professors applying for tenure in the same "division" at the same time were similarly situated when one taught sociology and one psychology). Even accepting this

standard as setting the breadth of comparison, Dr. Whiting compares herself to at least one other person in her department, who applied for tenure at the same time. Assuming, arguendo, that Dr. Whiting has met her burden for establishing different treatment of similarly situated individuals, she must also have shown that there was no rational basis for the decision to deny tenure.

To withstand a motion for summary judgment, however, Dr. Whiting must have established that a genuine issue of material fact exists as to whether any rational basis could exist for the government's action. See, Celotex Corp. v. Catrett, 477 U.S. 317, 322-3 (1986) (establishing standard for non-moving party in summary judgment motion); Bd. of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356, 367 (2001) ("the burden is upon the challenging party to negative '"any reasonably conceivable state of facts that could provide a rational basis for the classification."' (quoting Heller v. Doe, 509 U.S. 312, 320 (1993), in turn quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993)); see also, Levi, 840 F.2d at 280 ("the rational-basis test generally requires only that the relation to the state's purpose be 'at least debatable'"). In applying

this test to equal protection claims regarding tenure decisions, this court has held that,

> [the test] does not permit a judge or jury simply to second-guess University officials' academic judgment concerning a tenure decision...To the extent a decision concerning a teacher's or student's academic performance requires "an expert evaluation of cumulative information," it lends itself poorly to judicial review. Levi, 840 F.2d at 280 (internal citations omitted).

A. In Levi, the plaintiff alleged an equal protection violation where undue emphasis had been placed on his tendency to grade too leniently, a focus not used in evaluating another professor for tenure. Id. Plaintiff first challenged the rationality of the grounds on which the university based his denial of tenure. He alleged a number of irrational grounds for this discrepancy in treatment, and asserted the inference that the university had given out rational grounds for his dismissal as "a pretext for a decision actually taken out of irrational ill-will." Id. at 281. Nonetheless, the court found that in each case the university proffered a debatably rational justification. Id. In these circumstances, this court held that

> the plaintiff had failed to show that the university's behavior was irrational, even where such behavior may have appeared unwise. Accordingly, the court granted a motion for directed verdict against the plaintiff, noting that such decisions "call[] for the exercise of professional judgment, and a reasonable jury could not find that the University officials failed to exercise that judgment or ventured 'beyond the pale of reasoned academic decision-making.'" Id.

The instant case is similar. Dr. Whiting is alleging that different standards were applied to evaluate her under the "research" portion of the tenure criteria. She further alleges that the rational reasons put forth by the defendants are no more than pretext for the underlying, irrational reason for her denial of tenure, i.e., President Thames's purported bias against her as a result of the ill will his daughter, Dr. Thames, bore her. As in Dr. Levi's case, however, "[a]ll of these decisions were at least debatable, and none reveals a failure to exercise professional judgment." Id. at 281. Dr. Whiting has thus failed to meet her burden of proof on that standard when under summary judgment review.

C. The First Amendment Retaliation Claim

Finally, Dr. Whiting alleges that she has been denied tenure in retaliation for an alleged ruling against Dr. Thames while sitting on a panel reviewing student grievances against administrative actions.[4] Succeeding on a First Amendment retaliation claim requires that Dr. Whiting show,

> (1) she suffered an 'adverse employment decision'; (2) her speech involved 'a matter of public concern'; (3) her 'interest in commenting on matters of public concern...outweigh[s] the Defendant's interest in promoting efficiency'; and (4) her speech motivated the adverse employment decision [i.e., a causal connection]. Beattie v. Madison County Sch. Dist., 254 F.3d 595, 601 (5th Cir. 2001) (citing Harris v. Victoria Indep. Sch. Dist., 168 F.3d 216, 220 (5th Cir.).

Defendants argue that Dr. Whiting has not offered any evidence that her conduct was a motivating factor in

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[4] In her Reply Brief, Dr. Whiting also raises a First Amendment claim that she suffered an adverse employment decision because of her association with other professors in the Department for whom Dr. Thames cared little. As the argument was not raised until her reply brief, it is not considered here.

her discharge. See Beattie, 254 F.3d at 605 (such a failure resulted in a motion for summary judgment against the plaintiffs). The question focuses on whether a causal connection existed between her conduct and her denial of tenure.

In Beattie, the plaintiff claimed she had been fired because she opposed the reelection of the current superintendent. At various times, she was told by her school's principal that she should refrain from expressing her opinions on the matter. Shortly thereafter, the principal recommended to the superintendent that she be removed from her job. The superintendent presented the recommendation to the school board, which had previously discussed complaints regarding plaintiff's behavior with parents, teachers, and students. The board voted unanimously to remove her, and all stated in their affidavits that they had no knowledge of plaintiff's political activities or misconduct by defendants. Id. at 599-600. Beattie asserted, without further evidence, that it was her support of the opposing candidate for superintendent that lead the principal and the incumbent to recommend her removal to the school board. She lost on summary judgment

nonetheless: because neither of the people involved in the recommendation,

> cause[d] the adverse employment action, they cannot be liable under § 1983, no matter how unconstitutional their motives. Moreover, even if the board adopted their recommendation, that recommendation exhibited no unconstitutional motive on its face. Further, the evidence suggests that the board fired Beattie for independent reasons, and Beattie offers nothing but her own beliefs to the contrary.

Id. at 605.

Dr. Whiting's case is similar. Dr. Whiting alleges that after she spoke out against Dr. Thames's behavior, Dr. Thames retaliated by injecting scurrilous accusations of academic fraud into Dr. Whiting's tenure and promotion evaluation. Unlike Ms. Beattie, however, Dr. Whiting denied in her deposition that she "at any time hear[d] any of [her] supervisors at USM tell [her she] could not speak about certain issues," and stated that she did not believe that she had been denied tenure based on any statements she had made.

The causal link alleged is twofold: first, that the "poisoned" dossier made its way through the tenure and

promotion process, allegedly leaving otherwise ill-founded doubts in its wake as to Dr. Whiting's suitability. That same dossier, it should be noted, contained Dr. Whiting's various rebuttals to Dr. Thames's alleged claims, and expressed concerns over her qualifications in terms of the "service" criteria as well. Furthermore, the dossier had been evaluated by around 30 people by the time it reached President Thames, and subsets of that group had come to differing conclusions as to whether Dr. Whiting merited tenure. The record suggests, then, that the file reaching President Thames contained not just Dr. Thames's accusations, but also concerns, praise, and questions from a substantial number of other people.

Second, Dr. Whiting alleges President Thames's close relationship with his daughter, Dr. Thames, left him "biased and prejudiced" and inclined to go along with his daughter's alleged smear campaign. Dr. Whiting offers nothing but her own beliefs as foundation for this causal chain. President Thames's affidavit states that he had not discussed Dr. Whiting's tenure and promotion application with his daughter or her allies, and that he based his decision not to award tenure on a careful and independent review of Dr. Whiting's dossier.

While Dr. Thames's accusations may, indeed, have been retaliatory, Dr. Thames was not responsible for the final decision to deny tenure. It could be argued that her accusations eventually influenced President Thames by their very presence in the record, but Dr. Whiting makes no argument beyond her assertions of belief that President Thames based his decision on the information inserted by his daughter, to the exclusion of all other data in the file. Nor does she offer anything beyond her own beliefs to suggest that President Thames himself carried an inherent bias against her due to his close relationship with his daughter. Accordingly Dr. Whiting has failed to meet the standard necessary for her First Amendment retaliation claim to survive summary judgment.

## REMAND TO STATE COURT

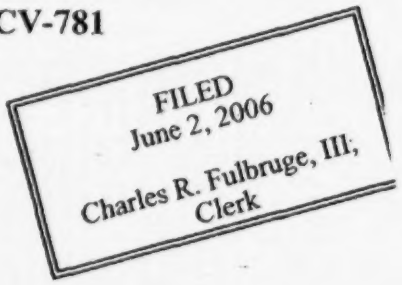
As we here affirm the district court's grant of summary judgment as to Dr. Whiting's constitutional claims under 42 U.S.C. § 1983, the only remaining issues in the case are pendent questions of state law. District courts are given broad discretion to remand removed cases with pendent state law claims where retaining jurisdiction would not be appropriate. Carnegie-Mellon Univ. v. Cohill,

484 U.S. 343, 357 (1988) (noting that this allows the district court to best serve the principles of "economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine."). Dr. Whiting states her concerns regarding the possible prejudice and hardship that such a transfer will place upon her. Nothing, however, suggests that the district court's decision to remand to state court constitutes so great a wrong as to constitute abuse of discretion. Accordingly, we affirm the district court's order remanding Dr. Whiting's pendent state law claims to state court.

For all the reasons stated above, the judgment of the district court is AFFIRMED.

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

**No. 04-60956**
**D.C. Docket No. 2:02-CV-781**




**MELISSA WHITING**

**Plaintiff - Appellant**

**V.**

**UNIVERSITY OF SOUTHERN MISSISSIPPI; SHELBY THAMAS, Dr.; DANA THAMES, Dr.; CARL MAS TRAY, Dr.**

**Defendants - Appellees**

**Appeal from the United States District Court for the Southern District of Mississippi, Hattiesburg**

Before HIGGINBOTHAM, WIENER, AND DENNIS, Circuit Judges.

**JUDGMENT**

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: JUL 17 2006

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF MISSISSIPPI**
**(HATTIESBURG)**

| | |
|---|---|
| **MELISSA WHITING** | **CIVIL ACTION** |
| **VERSUS** | **NO. 2:02-781** |
| **UNIVERSITY OF SOUTHERN MISSISSIPPI, ET AL** | **JUDGE LEMELLE (2)** |

FILED
Sep. 28, 2004
Southern District
of Mississippi
Clerk

**Filed September 28, 2004**

**ORDER**

For oral reasons given at the previous hearing on Defendant's motion for summary judgment and for oral reasons given at today's teleconference with parties' counsel, IT IS ORDERED that:

(1) Defendant's motion for summary judgment is GRANTED, in part, DISMISSING all federal law claims and DENIED, in part, as to the state law claims;

(2) After balancing the relevant factors of judicial economy, convenience, fairness, and comity, and considering counsel's evaluations, the state law claims are hereby REMANDED back to the state court from which said claims were removed for further proceedings. 28

U.S.C. § 1367(c) (3); *Carnegie-Melon University v. Cohill*, 484 U.S. 343, 351, 108 S.Ct. 614, 98 L.Ed. 2d 720 (1988); accord *Brown v. Southwestern Bell Tele. Co.*, 901 F.2d 1250, 1254-55 (5th Cir. 1990)

All pretrial and trial dates, along with all pending motions, are cancelled/dismissed as moot.

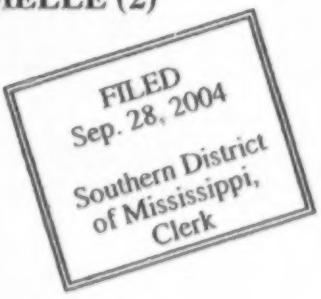
New Orleans, Louisiana, this 24th day of September, 2004.

/s/ IVAN L.R. LEMELLE
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF MISSISSIPPI**
**(HATTIESBURG)**

| | |
|---|---|
| **MELISSA WHITING** | **CIVIL ACTION** |
| **VERSUS** | **NO. 2:02-781** |
| **UNIVERSITY OF SOUTHERN MISSISSIPPI, ET AL** | **JUDGE LEMELLE (2)** |

**Filed September 28, 2004**




**JUDGMENT**

IT IS ORDERED, ADJUDGED, AND DECREED that all federal claims are DISMISSED and the state law claims are REMANDED to state court.

New Orleans, Louisiana, this 24th day of September, 2004.

/s/ IVAN L.R. LEMELLE
UNITED STATES DISTRICT JUDGE

what you originally asked me of his daughter, I think I've just gone over that. I think its in the -- it was in the dossier and what his reaction was to it.

Now, I wanted to point out one other thing. I wanted to accentuate, if I could, that Robinson v. Board of Trustees at 477 So.2d 1352 accentuates that the employee's handbook is part of the employment contract and all the standards that are in that -- and I need to say this, too. That when the employment handbook uses a term that –

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Sep. 13, 2004
Southern District
of Mississippi,
Clerk

THE COURT: Mr. Chaze, you –

MR. CHAZE: Going far afield?

THE COURT: No. I agree with you on that point. I'm playing my hand now.

MR. CHAZE: All right. I'll hush.

THE COURT: All right. This lawsuit arises from the University of Southern Mississippi's denial of tenure and promotion to the plaintiff, Dr. Melissa Whiting, Ph.D. The plaintiff is a former USM professor who was denied academic promotion and tenure. Defendants are University of Southern Mississippi, its board of trustees, the university president, the college dean and the department chair. The individuals are sued in their personal and official capacities. Dr. Whiting seeks damages and injunctive relief under two theories. First, deprivation of constitutional rights under color of law pursuant to Section 1983 of Title 28, United

*States* Code. And secondly, for breach of contract under *state* law.

Immediately before the Court are the dispositive motions filed by the defendants for summary judgment. Dr. Whiting in my view is an accomplished, well-credentialed academic. During her time at University of Southern Mississippi from 1996 to 2001, she received nothing but the highest ratings on her evaluations, and her record is virtually free of demerit.

When she came up for tenure and promotion, however, several professors in her department accused her of academic fraud, alleging that she published the same article twice, but that she altered the data from one publication to the next.

Dr. Whiting strenuously denied the allegations and argues in her pleading to the Court, with little evidence to the contrary, that the charges are erroneous. While some evidence exists suggesting that the charges may have been based upon a simple misunderstanding, there's other evidence that suggests that the professors who leveled the charges might have had some disputes with Dr. Whiting in the past. There is some evidence to some extent that Dr. Whiting's tenure application was affected by those charges, among other things.

The primary question on summary judgment has to be legal, not factual questions. The basis for the facts that -- at least the facts that we have here without any dispute are that

Dr. Whiting obtained her Ph.D. from the University of Oklahoma. The University of Southern Mississippi hired her as an assistant professor of education in 1996. She specializes in secondary education. Her background is in English. And she has practiced her research methodology in a methodic manner. And her research methodology, at least, was known as qualitative, as distinctive from quantitative, research. USM evaluates its faculty in three areas: Teaching, service and research. From 1996 through 2001, Dr. whiting received the highest possible marks in all three areas of evaluation. In addition, the university has awarded several research grants to Dr. Whiting. Her students nominated her to

receive recognition for excellence in teaching. She served positions with two national professional organizations, served on the university accreditation team, as well as on numerous other panels and organizations. Before being hired at USM, Dr. Whiting published at least one article and one book, which were based upon her doctoral thesis. After arriving at the University of Southern Mississippi, she published several annotated bibliographies, gave presentations at numerous local, state and national conferences, and published three articles in peer review journals. She wrote a chapter f or an educational text in either 2000 or 2001. The chapter was published in March of 2002. With that background, Dr. Whiting applied for tenure and

promotion in August of 2001.

USM's tenure process has four basic levels: The department, the college, the university and the executive administration, that is, the president and the board of trustees. At each level, the application for tenure is reviewed by a panel who ultimately votes the application up or down. After the panel makes its recommendation, a single official reviews the recommendation and gives his or her own view. At the department level, the department chair makes a recommendation. At the college level, the dean gives a recommendation. At the university level, the provost makes a recommendation.

At the conclusion of the process here, the president makes

a final recommendation. If the recommendation is positive, it is then forwarded to the board of trustees. And if negative, the decision is final, but the affected employee can appeal to the board of trustees.

Dr. Whiting accumulated a mixed record of recommendations for tenure and promotion. Her department recommended her promotion, but denied her tenure. The college review denied her promotion and tenure. The university recommended promotion and tenure. And the provost agreed.

What happened at the level of the president is what brings us here basically. The only witness to speak on this issue, Dr. Shelby Thames, the president, was supposed to make his

decision by May 1 of the academic year. The decision logically should be made in advance of the beginning of a new academic year because the tenure and promotion decision determines the terms of the employee's contract during the following academic year.

If the decision is not made prior to the new academic year, the parties will not be able to enter into an employment contract. This is so for several reasons. First, an employee who would be entitled to higher pay following a promotion. Second, an employee who fails to receive tenure must be notified, no later than September 1, that he or her -- that her contract will not be renewed. These matters simply cannot be

determined unless a decision on promotion and tenure is finalized.

In this case, the provost did not complete his review until May 17th, 2002. The university published a list of faculty who were awarded tenure and promotion sometime in June.

The president failed to issue a decision on Dr. Whiting's application until August 30th, 2002, eleven days after the commencement of the 2002-2003 academic year. Consequently, on August 19, 2004, the date on which the 2002 academic year began, Dr. Whiting had no contract for employment with the university.

The whole issue of when Dr. Whiting's tenure actually was denied or the effect of it -- the denial was upon this -- upon

this whole situation is complicated by the fact that Dr. Whiting filed suit on August 6th, 2002. In September, Dr. Whiting appealed the president's denial to the board of trustees. In November, the board of trustees rejected Dr. Whiting's appeal stating that it was dismissing the appeal due to the fact that the matter was in litigation.

According to the documents that govern the tenure process -- and these basically are the College of Education and Psychology's Policies and Procedures for Tenure and Promotion, the faculty handbook and the board of trustees' policies and bylaws, which are attached to the defendants' motion as Exhibits 5, 9 and 33.

A candidate for tenure needs to show, quote, high and sustained quality performance in two of the three university

missions -- i.e., teaching, research and service -- and exhibit satisfactory performance in the third, unquote. Evidence generally indicates that Dr. Whiting satisfied the criteria for tenure in the areas of teaching and service. This evidence includes her annual reviews, the decisions of the department, the decisions of the university advisory committee and the depositions of Shelby Thames, Eric Luce and Gloria Slick.

Consequently, the primary question relating to whether Dr. Whiting deserved tenure was whether or not her research performance was merely satisfactory.

The records from each level of the tenure review process

indicates that the issue of alleged academic fraud relating to two of Dr. Whiting's articles may have been the pivotal issue affecting the evaluation of her research efforts. The depositions of Dana Thames, Gloria Slick, Eric Luce and Dr. whiting all reflect that the question of academic fraud was the centrally discussed matter. See especially the deposition of Dr. Dana Thames at pages 59 through 80, the deposition of Eric Luce at 43 through 53, the deposition of Gloria Slick at pages 64 to 66 and the deposition of Dr. Melissa Whiting at pages 34 through 51.

From my review of this record, the evidence strongly supports the contention that the allegations of academic fraud was a key contributing factor to the university's denial of

Dr. Whiting's application for tenure.

Dr. whiting advances her Section 1983 constitutional law claims under three theories. That she was deprived of due process, equal protection and that the defendants' actions violated her free speech rights.

To allege a deprivation of due process, Dr. whiting must first show a protected liberty or property interest. It is well established law that a nontenured professor fails to show a property or liberty interest when he or she complains of the denial of tenure or the loss of employment. See Staheli v. University of Mississippi, Fifth Circuit opinion from 1988, and Wicks v. Mississippi Valley State University, a Mississippi

state court decision from 1988.

The mere subjective expectancy of tenure does not give or

arise to a constitutionally protected property interest

necessary to invoke the 14th Amendment without more.

Dr. Whiting argues that the procedures set out in the faculty

handbook performs the necessary alchemy of transforming her

expectations into protectable interests. That argument in my

opinion founders, however, because the same faculty handbook

reiterates that, notwithstanding the procedures, tenure is

awarded at the discretion of the board of trustees upon

nomination by the president.

Dr. Whiting also argues that she was deprived due process

based upon the fact that she suffered reputational injury. She

cites Wisconsin v. Constantineau, a Supreme Court opinion from 1971. That case and its related precedents, a public employee states a due process violation by alleging termination of her employment for a reason that is false, publicized. And subsequent denial of employment opportunities ensued as a result. Case on point would be the Fifth Circuit case of Cabrol v. Town of Youngsville from 1997. However, the stigmatization caused by job loss, without more, does not rise to the level of a due process complaint according to the Fifth Circuit in Cabrol. A party must show additional evidence of stigmatization, such as publication of the party's dishonesty or immorality.

MARGARET W. SEAL, IMR, CRR

Here, even though Dr. Whiting has claimed that she's been denied job opportunities due to the denial of tenure, she fails to allege that she lost these opportunities because potential employers viewed her as dishonest. Instead, she merely alleges that employers look upon her with suspicion because the University of Southern Mississippi denied her tenure. This amounts to no more than stigmatization of job loss. Accordingly, it does not meet the Fifth Circuit standard.

Dr. Whiting also alleges that she was denied tenure out of retaliation for her exercise of free speech rights. Specifically, she claims that Dr. Dana Thames retaliated against her because Dr. Whiting ruled against Dr. Thames, Dana Thames, on a panel that reviews student grievances of

administrative actions. The debatable matter of whether
Dr. Whiting's views on particular grievances qualify as public
concerns need not be addressed to determine this issue.
Established precedent requires a plaintiff to show that
the final decision maker has actual knowledge of the alleged
improper basis. The Fifth Circuit case Beattie v. Madison
County School District from 2002 -- 2001 establishes the
standards for reviewing the First mendment claim here. To
satisfy that standard, Dr. Whiting must show that either the
president, Dr. Shelby Thames, or the board of trustees had
actual knowledge that Dr. Whiting was being retaliated against
due to her rulings on the grievance panel. Dr. Whiting in my

view has failed to demonstrate genuine questions of fact on this issue. There is no evidence that either -- there's no material evidence to indicate that either President Thames or the board were aware of this alleged dispute.

The closer question in my view on the federal law claims deals with the claims under equal protection. Dr. Whiting does not allege discrimination due to her membership in a protected class. Instead, she argues under the equal protection clause's class of one jurisprudence that she has been intentionally treated differently from other similarly situated individuals and that there is no rational basis for the difference in treatment.

The primary case or in my view the seminal case in this

approach is the Village of Willowbrook v. Olech, Supreme Court opinion, 528 U.S. at 562, specifically at page 564, from the year 2000. Prior to the Olech decision, the Fifth Circuit specifically in my view at least rejected that theory. So we have somewhat sparse case law at least from the Fifth Circuit in this particular area. And I believe that the determination of this particular claim, the equal protection claim, turns on how the rational basis test is to be applied in this particular context.

Under ordinary, rational basis analysis, Dr. Thames' reliance upon the recommendations of various levels of the tenure process, which also included a recommendation from his

own daughter, has to be viewed in the context of how this tenure application progressed before it got to Dr. Thames. I've already viewed that progression earlier. What's important to remember is that in this particular case Dr. Thames did not only have the recommendation of his daughter, but he also had the vote, the record of various other individuals who participated in this tenure process. I do not find that a reliance upon the recommendation that included his daughter, among several others, in any way infers that Dr. Thames' analysis, decision was somehow tainted because of his blood relationship. Because as we saw earlier, the process included several other individuals, about 29 in total.

Many of whom, including his daughter, recommended against tenure and/or promotion of Dr. Whiting. And many, on the other hand, recommended for it. Dr. Thames had a decision to follow one or the other.

One cannot by speculation or conjecture say that his decision here was ill will in the context of the equal protection claim because his daughter had recommended a position that he ultimately followed. Because as I stated earlier, there were other individuals who also made the same recommendation, both -- particularly after Dr. Thames.

But importantly to me is this issue of the actual rationale for the decision. The actual rationale for the action and the official conduct has to be made with regard to

whether there *was a* legitimate reason for the decision. It's not a question of whether or not the decision to deny tenure was a correct decision, but whether or not it had a rational legitimate basis. While it's important to focus upon Dr. Shelby Thames' intent, motive, it's also important to focus, I believe, upon how that decision and in what context that decision was made.

The application in my view of ordinary, rational basis scrutiny to Dr. Thames' actions -- because I believe that's basically who we're talking about as the ultimate decision maker, where it ended, even though there was an appeal later on by Dr. Whiting to the board. We're talking basically about Dr. Whiting's -- Dr. Shelby Thames' conduct and whether or not

that conduct was motivated by some ill will to Dr. Whiting and whether or not there was any ordinary, rational basis for what he did.

I cannot overlook the fact that, as pointed out to me today, a majority of the individual professors, faculty administrators looking at this tenure promotion process had voted against tenure. Of course, the majority also voted for promotion, I believe. So we have a situation where there are two conflicting points of view within the university system.

It wasn't just the position of Dr. Thames daughter. It was the position of several others, including his daughter, that we had to look at. This would have presented a closer issue if it

was only his daughter's situation that we were looking at and not several others. But in my view, the class of one theory of equal protection and whether or not there was any rational basis or illegitimate conduct on the part of Dr. Thames in the equal protection context has to be analyzed with a broad view on how that decision was made.

As a matter of law, I find that Dr. Whiting has failed to sustain her burden of showing that there are material factual disputes on the issue of the equal protection claims. I find that there were legitimate reasons for the actions of the president in relying upon the recommendations of several others in this review process that were not tainted by the fact that

his daughter might have been one of the individuals in that review process. He has to rely upon the entire record. I see no indication that he did anything to the contrary. We also have to view it in terms, too, of this particular claim at least, in terms of the state law claims. Those to me are the more -- those to me are the viable claims. Her contractual claims are based upon the University of Southern Mississippi's faculty handbook, her employment contract in the past as well as statements of policy regarding faculty tenure and promotion. Dr. Whiting has alleged five breaches of these agreements. That the board failed to give Dr. Whiting a hearing prior to ruling on her appeal. That the president failed to decide Dr. Whiting's tenure and promotion prior to

May 1. That the president failed to notify Dr. Whiting of his decision prior to the expiration of her employment contract. That the university failed to give Dr. Whiting a terminal contract. And that Dr. Shelby Thames' denial of Whiting's tenure was arbitrary and capricious.

As a threshold matter, as I indicated earlier, I thought the university's argument that there was no extant agreement between the university and Dr. Whiting at the time of tenure and promotion were denied as being somewhat disingenuous. The university noted that Dr. Whiting's final employment contract was effective from August 16, 2001, until May 16, 2002. Since no other contract was entered between the parties, the university claims it was not bound by any agreement.

There's two problems, I believe, with that argument.

First, the employment contract is expressly subject to the board's policies. And the university does not contest that the employment contract is supplemented by the faculty handbook.

As I pointed out earlier, the board's bylaws and the handbook -- faculty handbook, that is --imposed obligations upon the university that extend beyond the nine month period of the employment contract. For instance, the handbook requires that the university give long-term probationary employees a year's notice of determination not to renew their employment contract. And again, because the university renews all of its faculty contracts during the summer, the summer is the only

time this provision could reasonably apply. Accordingly, for this provision to have any effect, it must extend through the end of the academic year.

The second reason I believe the university's argument is problematic is that under the handbook, the university was obligated to notify Dr. Whiting of its determination of her tenure application by the expiration of her employment contract. Thus, by arguing that because he waited until August, no contract was in effect at the time Dr. Shelby Thames ruled on Dr. Whiting's tenure application, it seems to me as if the university may be attempting, intentionally or unintentionally, to benefit from its apparent breach of the handbook. I believe Mississippi state law and principles of

estoppel would preclude that argument.
At the same time, I recognize that the plaintiff has alleged that the board has failed to give Dr. Whiting a hearing. That claim in my view lacks a basis in the employment agreement. In discussing the board's review of a tenure recommendation, the board's policies expressly provide, quote, no person shall appear personally before the board unless invited, unquote.
As regards to the president's failure to decide Whiting's tenure and promotion prior to May 1, it seems that the handbook would preclude that particular claim. The handbook does not impose May 1 as a mandatory deadline. Rather, it provides

that, quote, in the event that a personnel action recommended
to the university president is not appealed, presidential
decisions are normally communicated to affected parties by May
1. Likewise, the College of Education and Psychology's
Policies and Procedures for Tenure and Promotions provides,
quote, candidates may expect to receive written modification of
the final decision from the president or his or her designated
representative by May 1 uniess an appeal is invoked, unquote.
I don't believe that this precatory language would give rise to
a breach of contract claim.
However, the president's failure to notify Whiting of the
decision prior to the expiration of Dr. Whiting's employment
contract and the university's failure to give Dr. Whiting a

terminal contract as well as the remaining state claims seem to me to involve some factual disputes, some issues that in my view at least would require analysis and weighing of the evidence by a jury. But more importantly, I believe, while I have made some cornntents about the state law claim, the contract, the handbook, the bylaws, the effect of this, I in no way mean to indicate that those findings would have any effect on a later review in court.

I've given to you gentlemen my reasons why defendants' motion for summary judgment should be granted in part, denied in part. I did not discuss the qualified immunity issues, but I believe, to make the record clear, it is correct Supreme

Court law that states and state agencies are not wi[illegible] the class of potential defendants under Section 1983. And that the board of trustees and the university are agents of the State of Mississippi. I'm analyzing again the Section 1983 claims.

And it is true that also an official capacity suit is in all respects other than name to be treated as a suit against the entity. And as I already noted, Drs. Shelby Thames, Carl Martray and Dr. Dana Thames are sued not only in their individual capacities but also in their official capacities for monetary damages. Supreme Court and Fifth Circuit precedent in my view would preclude such official capacity claims and would be precluded in this case.

Further, public officials charged with civil rights violations under Section 1983 can under certain circumstances be shielded from liability for civil damages so long as their conduct does not violate clearly established statutory or constitutional rights or is objectively reasonable. Claims of qualified immunity are analyzed under a two-step process. First, the Court must determine whether the plaintiff has alleged a violation of a clearly established constitutional right. If the plaintiff fails in that step, the defendant is entitled to qualified immunity. If the plaintiff is successful, the issue becomes the objective legal reasonableness of the defendant's conduct under the circumstances.

MARGARET W. SEAL, RMR, CRR

I have already found that the Section 1983 claims both for due process, equal protection and under the First Amendment do not present material factual disputes. And I have granted summary judgment on those particular claims and in my view need not address them -- any remaining issues on qualified immunity. If there's no constitutional violations, then there is no need to apply qualified immunity.

Accordingly, the Court will enter judgment in effect, one, granting summary judgment to the extent that the Court has found no basis for the Section 1983 suit under the facts and law in this case -- although law to be applied in this case to what I find to be no material factual disputes over dismissing the First Amendment, equal protection and due

process claims under federal law. The Court denies the summary
judgment motion to the extent that it seeks a dismissal of the
plaintiff's state law claims for the reasons that I've given
earlier.
And that brings us back, gentlemen, to that first point
that I raised at the very beginning. What effect this would
have if only I had left state law claims. I realize that this
is gonna be a final judgment, and then your appeal rights do
not begin until I make a written -- follow-up written judgment
and issue that judgment to you.
But it brings us back to the issue of the remaining state
law claims and whether or not to proceed here under pendant

(2)

No. 06-460

Supreme Court, U.S.
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In The

# Supreme Court of the United States

RECEIVED
SUPREME COURT, U.S.
2006 DEC -5 A 9:

MELISSA WHITING,

*Petitioner,*

v.

UNIVERSITY OF
SOUTHERN MISSISSIPPI, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Did Dr. Melissa Whiting, a non-tenured faculty member at the University of Southern Mississippi, have a federally protected property interest in tenure or promotion? Even if Dr. Whiting did have a property interest protected by federal due process, did the Defendants violate her property interest?

2. Has Dr. Whiting demonstrated the circuit court misapplied its equal protection analysis, creating a split among circuits?

3. Has Dr. Whiting offered any evidence rebutting testimony showing the decision regarding her application was fair, impartial, and based on constitutionally permissible reasons?

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## INTRODUCTION

Dr. Melissa Whiting, a former non-tenured faculty member at the University of Southern Mississippi, filed this suit in state court following denial of her application for tenure and promotion. Dr. Whiting alleges the denial arose from ill will between her and her department chair, Dr. Dana G. Thames, the daughter of the University President, Dr. Shelby F. Thames. Dr. Whiting argues the decision of President Thames denying her tenure and promotion was motivated by the alleged ill will between her and Dr. Dana Thames. Dr. Whiting offers nothing, however, to rebut the testimony of President Thames that he was unaware of alleged unconstitutional motives and made the decision to deny her application for reasons related to her insufficient publication record.

After removal, both the district court and the circuit court determined that Whiting could not maintain her claims under federal law because she 1) had not established a property interest in tenure or promotion, 2) had not demonstrated a lack of rational basis necessary to maintain a "class-of-one" equal protection claim, and 3) had not rebutted the testimony of the University's president showing a rational basis for his decision. Dr. Whiting does not include in her petition the circuit court's decision denying her claim of a violation of liberty interest or the decision denying her First Amendment retaliation claim.

## STATEMENT OF THE CASE

### I. Facts

In September 1996, the Board of Trustees of the State Institutions of Higher Learning approved the employment

of Melissa Whiting as an assistant professor in the Department of Curriculum, Instruction, and Special Education in the College of Education and Psychology at The University of Southern Mississippi. Dr. Whiting was hired under a nine-month contract effective August 21, 1996, and extending until May 22, 1997. R. 381-83. The Board, in May 1997, approved Dr. Whiting for tenure-track status, effective August 21, 1996. R. 385-87. In addition to the 1996-97 contract, the Board and Dr. Whiting executed five successive nine-month contracts for academic years 1997-98, 1998-99, 1999-2000, 2000-01, and 2001-02. R. 389-93. Each contract identifies the parties (the Board of Trustees and Melissa Whiting), the term of employment (a nine-month period), and the annual salary. *Id.* The contracts state they are subject to the "laws of the State of Mississippi and the policies and by-laws of the Board." *Id.*

In August 2001, at the beginning of her sixth year at the University, Dr. Whiting asked the University to consider her for tenure and for promotion to associate professor. R. 395-96. Dr. Whiting submitted her credentials in the form of a "dossier." *Id.* An academic dossier is a collection of materials required to be assembled and submitted by each candidate for tenure and promotion. R. 422. The dossier contains documentation demonstrating suitability for tenure and promotion. *Id.* The required format for tenure and promotion dossiers is set out in a publication of the College of Education and Psychology entitled "Policy and Procedures for Tenure and Promotions." *Id.* The procedures require that each candidate submit documentation about her work in the areas of teaching, scholarship and publication, and service activities. *Id.*

By the time Dr. Whiting's dossier reached the President, at least twenty-nine people had participated in the

review of Dr. Whiting's dossier. Fifteen recommended against tenure, twelve recommend in favor of tenure, and two recused themselves or abstained. Fourteen recommended in favor of promotion, twelve recommended against promotion, and three recused themselves or abstained. University President Shelby F. Thames decided against tenure and promotion. The specific process regarding Dr. Whiting's application for tenure and promotion is summarized below.

### A. The Department Level

#### 1. The Tenure and Promotion Committee

First, a committee of faculty from the Department of Curriculum, Instruction, and Special Education met on September 28, 2001, to consider Dr. Whiting's application for tenure and promotion. According to the summary report of this meeting, "some questions" arose during the committee's deliberations about "various articles in [Dr. Whiting's] publication section" of her dossier. R. 424. The committee "decided to delay consideration of her tenure and promotion requests until Dr. John Davis, Committee Chair, and Dr. Dana Thames, Department Chair, had the opportunity to meet jointly with Dr. Whiting to request a written response to these questions about various articles in her publication section (as per procedures in the Faculty Personnel Action, XI-17, item 13.4)." *Id.*

Dr. Whiting submitted a written response to the committee. R. 426-27. "Dr. Melissa Whiting's response to Dr. Davis [sic] and Dr. Thames [sic] 'Data Questions.'" In her response, Dr. Whiting gave her explanation of the "methodology and analysis" she used to write several published articles. *Id.*

The Department's tenure committee reconvened on October 2, 2001. Dr. Davis distributed Dr. Whiting's written response. R. 429-30. According to the written summary of the committee's meeting of October 2, 2001: "Questions remained, however, about discrepancies in the raw data of the two published articles and about the similarities between the two published articles, the one in *FOCUS: Teaching English Language Arts* and the one in *Journal of Research in Rural Education*." *Id.* According to the committee's report:

> Extensive discussion related to Dr. Whiting's request for promotion took place. The discussion seemed to indicate that there were mixed opinions about Dr. Whiting's research/scholarly performance. There were questions about whether Dr. Whiting met the criterion for promotion related to consistently demonstrating quality performance in research/scholarly activities, making it questionable whether a rating in this area could be labeled satisfactory or higher, as specified in the *College of Education and Psychology: Policy and Procedures for Tenure and Promotion*, January 1997, pages 8-11.

*Id.*

The report also indicates similar concerns about Dr. Whiting's application for tenure. *Id.* Although the committee "felt her teaching and service were good," there were concerns "about Dr. Whiting's consistent availability to advise students and about her sporadic attendance at meetings." *Id.*

The committee, voting by secret ballot, decided to award Dr. Whiting a promotion. The vote was six in favor

of promotion, three against promotion, and two abstentions. *Id.*

Next, the committee considered Dr. Whiting for tenure. "It was pointed out," states the report, "that IHL guidelines and Faculty Handbook indicate that tenure occurs between the completion of five and seven years of continuous service to the university." *Id.* According to the summary report: "There was general agreement that Dr. Whiting should not request tenure until *completion* of her sixth year." *Id.* (emphasis in original); *see also* R. 452, Excerpts of Faculty Handbook, § X (4.7) (explaining that a tenure candidate may request a deferral of the tenure process until the seventh year of contracted employment). The Department committee voted against awarding tenure. *Id.* Six members voted against awarding tenure, four voted in favor, and one abstained. *Id.*

By two separate letters dated October 2, 2001, Dr. Davis, the committee chair, notified Dr. Whiting of the results of the promotion and tenure process. R. 492-94. The letter regarding tenure explained the committee's "considerable concerns" regarding Dr. Whiting's "research/scholarly performance." R. 494. The letter also stated that Dr. Whiting had

> the option of continuing in the process, or withdrawing [her] request for early tenure, at this level or any of the subsequent levels of consideration. The vote of the Committee seems to indicate that you might want to consider withdrawing your request at this time, because you have until the end of the seventh year to attain tenure. The final decision about continuing the process rests with you.

*Id.*

### 2. The Department Chair

By two separate letters dated October 4, 2001, Dr. Dana Thames notified Dr. Whiting about the committee's determination. R. 496-98. According to University policy, Dr. Dana Thames also prepared a written recommendation to Dr. Carl Martray, Dean of the College of Education and Psychology, regarding the recommendations of the Department committee's report. R. 500-03; R. 461, Excerpts of Faculty Handbook, § XI (8.1). According to the letter written by Dr. Dana Thames to Dean Martray, Dr. Whiting "***requested that her materials be moved forward and reviewed for both Tenure and Promotion to Associate Professor rank.***" R. 500-03. (bold and underline in original). *See also* R. 474-75, Excerpts of Faculty Handbook, § XI (13.5) (requiring Department Chair to "prepare independent written recommendations either concurring or disagreeing with the recommendations of Tenure Committees").

Dr. Dana Thames agreed with the Department's report "indicating that Dr. Whiting's progress toward the attainment of tenure is negative at this time and borderline at the present for promotion." R. 500. According to Dr. Thames' letter:

> In summary, I feel that Dr. Whiting's progress toward tenure and promotion is marginal at the present time. In my opinion, it would be in Dr. Whiting's best interest for her to withdraw her papers from tenure and promotion consideration at this time, because she has until the end of her seventh year to acquire tenure, and promotion may be requested at the beginning of any academic year. I make this recommendation because I believe that she has the potential to overcome the concerns of departmental peers. . . .

R. 501-02. A copy of this letter was mailed to Dr. Whiting. R. 503.

### B. The College Level

#### 1. The College Advisory Council

Notwithstanding the report of the Department committee and the recommendation of the Department chair, by e-mail dated October 12, 2001, Dr. Whiting indicated her desire to move her tenure and promotion application to the College Advisory Committee ("CAC"). R. 506.

The CAC, consisting of representatives from each department of the College of Education and Psychology, met to consider Dr. Whiting's tenure and promotion dossier on October 30, 2001, and November 7, 2001. R. 508-16. According to the tenure and promotion reports, the CAC conducted a "full and detailed discussion" of Dr. Whiting's dossier with awareness of the promotion and tenure guidelines of the Faculty Handbook. *Id.*

The CAC reviewed Dr. Whiting's dossier, the letter written by Dr. Dana Thames to Dean Martray dated October 10, 2001 (R. 500-03), and "a letter of rebuttal" submitted by Dr. Whiting to the CAC. R. 508-16. *Id.* The letter submitted by Dr. Whiting, eleven pages in length, challenges the recommendations of the Department committee and the recommendations contained in the letter written by Dr. Thames dated October 10, 2002. R. 518-27.

The CAC acknowledged the "disparity between the annual evaluations conducted by the various department chairs of Dr. Whiting's department and the report and recommendations of the promotion and tenure committee and the clarifications of the current department chair." R.

508-16. "The annual evaluations tended to be quite positive, while the report of the tenure and promotion committee was more negative."[1] *Id.* After examining the "credentials objectively and mak[ing] separate evaluations of Dr. Whiting's credentials contained in the dossier," the "CAC consensus was that it appeared that the annual evaluations of the chairs in the past were more optimistic than the credentials justified during many of the years." *Id.* According to the CAC:

> In considering Dr. Whiting's publication credentials, the CAC was concerned that there appeared to be a small number of refereed publications (three) and some publications were not in strong refereed journal outlets or represented contributions to invited publications (annotated bibliographies). A number of the publications contained in Dr. Whiting's vita were clearly published prior to her hire at USM (for example a book). Since her hiring at USM, it appears that she has published primarily annotated bibliographies. There is mention of a book chapter, but no documents in the dossier to substantiate the contract for that chapter. Although there is considerable debate in the dossier about Dr. Whiting's research efforts (her rebuttal/clarification letter and the Department Chair's letter), the consensus of the CAC members was that the research activity shown at this time, whether considered qualitatively or quantitatively, was not adequate and did not meet college research standards.

*Id.* at p. 2.

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[1] Consistent with University policy, Dr. Whiting had received annual evaluations from her Department chairs.

The CAC voted to deny Dr. Whiting tenure and promotion. The votes regarding tenure and promotion, although conducted separately, were identical in outcome: four against, two in favor, and zero abstentions. *Id.*

### 2. The Dean of the College

Dr. Carl Martray, Dean of the College of Education and Psychology, then reviewed Dr. Whiting's dossier for tenure and promotion as required by University policy. R. 529. Dr. Martray concluded that "after a thorough review of the recommendations of the CAC and the issues raised by the committee as well as a review of the portfolio materials submitted, I can find no compelling reason to recommend against the recommendations of the CAC." *Id.* Dr. Martray transmitted Dr. Whiting's application materials to the Provost without recommending either promotion or tenure. *Id.*

By letter dated November 27, 2001, Dean Martray notified Dr. Whiting of his decision, enclosing copies of the CAC reports. R. 532. Dr. Martray reminded Dr. Whiting that: "Upon receipt of this letter, you have the options of withdrawing your application for tenure and promotion and requesting that the recommendation be deferred to the seventh year (as recommended by your chair and departmental committee) . . . " *Id.* Dr. Whiting did not withdraw her dossier from consideration. According to the tenure and promotion policy, the Provost sought input from the University Advisory Council. R. 481.

### C. The University Level

#### 1. The University Advisory Council

The University Advisory Council ("UAC") met on at least two occasions to consider Dr. Whiting's dossier. R. 534-36. The UAC met on March 27, 2002, and on April 11, 2002. *Id.* Dr. Whiting was invited to attend the meetings but declined to attend on the advice of her attorney. R. 535, 536. Dr. Whiting did present a letter to the members of the UAC, however, alleging "prejudicial failures of due process" and violations of due process rights under the Fourteenth Amendment. R. 538-39. The UAC invited a number of witnesses to appear before the UAC: Dr. Carl Martray, Dr. Dana Thames, Dr. Carolyn Reeves-Kazelskis, and Dr. John Davis. R. 534-36.

According to the report of the UAC, dated April 24, 2002: "The concerns expressed by the department and college committees, chair, and dean pertaining to Dr. Whiting's research productivity and record of service were discussed at length. The UAC shared many of their concerns related to research, but found the area of service as documented to be more than adequate." R. 540-41. The UAC ultimately voted in favor of awarding tenure to Dr. Whiting. The vote was five in favor of tenure, three against, and one recusal. *Id.* Regarding promotion, the UAC did not reach a definitive conclusion, with four voting in favor, four voting against, and one recusal. *Id.* As Dr. Whiting's dossier moved forward to the Office of the Provost, Dr. Whiting supplemented her dossier again. R. 543.

#### 2. The Provost

Dr. Anselm Griffin, then Provost, concurred with the recommendation of the UAC to grant Dr. Whiting tenure.

By letter to Dr. Whiting dated May 17, 2002, Dr. Griffin indicated that he was "recommending to President Shelby F. Thames that you be granted tenure as a faculty member. . . ." R. 545-46. Although the UAC reached a tie regarding its vote for promotion, Dr. Griffin recommended promotion. *Id.*

**D. The President**

After carefully reviewing Dr. Whiting's credentials, University President Dr. Shelby Thames mailed Dr. Whiting two letters by Federal Express dated August 23, 2002, to her addresses in Petal, Mississippi, and Vinita, Oklahoma. R. 548-49. These letters, identical except for different addresses, requested a meeting with Dr. Whiting to discuss his concerns about her tenure application:

> I would like to discuss this matter with you prior to making my decision. I can meet with you on Tuesday, August 27, at 9:00 a.m. If you are unable to meet on Tuesday, I invite you to schedule a telephone conference. Please contact Ms. Polly Odom at 601-266-5301 to confirm a meeting on Tuesday or to schedule a telephone call.

*Id.*

Dr. Whiting chose not to meet with President Thames (in person or by telephone) to discuss his concerns about Dr. Whiting's tenure and promotion application. R. 551. Accordingly, President Thames wrote Dr. Whiting another letter on August 30, 2002, stating:

> I am disappointed that you did not take advantage of my invitation to meet with me and/or talk with me via conference call to discuss your tenure and promotion. This was an opportunity for

> you to talk with me about some of the issues raised during this process, and thus, I would have preferred to hear from you personally before making a decision.
>
> I have reviewed your tenure and promotion dossier and all the related materials. My conclusion is that I will not recommend to the Board of Trustees that you be granted tenure or promotion at The University of Southern Mississippi.
>
> This letter constitutes notice of non-renewal of your employment at USM. A contract of employment will not be offered to you after this academic year ending in May 2003.

*Id.*

### E. The Board of Trustees

Dr. Whiting appealed the decision of President Thames to the Board of Trustees on September 16, 2002. R. 553.

On November 11, 2002, Dr. Thomas D. Layzell, then Commissioner of Higher Education, sent Dr. Whiting's request for an appeal to the Board. Commissioner Layzell recommended the Board decline to consider the appeal. R. 573.

After discussing Dr. Whiting's request for an appeal in executive session during its meeting of November 21, 2002, the Board of Trustees declined to consider Dr. Whiting's appeal. The Board unanimously denied review of the President's decision regarding promotion and tenure because Dr. Whiting had already filed suit on August 6, 2002 – even before the President had made his decision. R. 575-78. The Board notified Dr. Whiting of its decision by letter to her attorney dated November 21, 2002. R. 580.

## II. Procedural History

On August 6, 2002, Dr. Whiting filed a complaint against the University and Drs. Shelby F. Thames, Carl Martray, and Dana G. Thames alleging damages arising from the tenure and promotion process. The complaint, filed originally in the Circuit Court of Forrest County, Mississippi, seeks several forms of relief, including damages in the amount of $5,000,000.00. The individual defendants are named in both their official and personal capacities. R. 568-71, Original Complaint.

The Defendants timely removed the complaint to federal court. The district court denied Dr. Whiting's motion to remand. Whiting amended her complaint on March 10, 2003, naming the Board of Trustees of Mississippi's Institutions of Higher Learning as an additional defendant.

Dr. Whiting alleges violations of her constitutional rights under the Civil Rights Act, 42 U.S.C. § 1983. She claims the Defendants deprived her of substantive and procedural due process, as well as rights protected by the Equal Protection Clause and the First Amendment. Under state law, Dr. Whiting alleges breach of contract and "nepotism." In addition to her claims for "compensatory and actual" damages of $5,000,000.00, Dr. Whiting seeks punitive damages, "appropriate injunctive relief," and "all relief to which she is entitled pursuant to 42 U.S.C. § 1983 *et seq.* to include attorneys fees." *Id.*

The district court granted the Defendants' motion for summary judgment with respect to all federal claims and remanded Dr. Whiting's state-law claims to state court. Dr. Whiting appealed the award of summary judgment and appealed the district court's decision to remand the state-law claims to state court. A three-judge panel of the Fifth

Circuit unanimously affirmed the district court. *See Whiting v. The University of Southern Mississippi*, 451 F.3d 339, 349 (5th Cir. 2006).

## REASONS WHY THE PETITION SHOULD BE DENIED

### I. Dr. Whiting failed to state a cognizable equal protection claim.

#### A. The Fifth Circuit did not err in applying *Village of Willowbrook v. Olech*.

Dr. Whiting's analysis of equal protection is confusing. At the outset, she invokes this Court's standard articulated in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), requiring the plaintiff to show "she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Petition, p. 9 (citing *Olech*, 528 U.S. at 564). Then, on the next page, Dr. Whiting criticizes the circuit court for holding that "Dr. Whiting must, in addition to the foregoing *Olech* standard, also establish or negate whether there was any rational basis for the government's action." Petition, p. 10. This is illogical. The rational basis test applied by the Fifth Circuit is not "in addition to" the *Olech* test – it is the exact standard mandated by *Olech*.

Next, Dr. Whiting criticizes the circuit court for not requiring Dr. Whiting to "show that the defendant's conduct was motivated by animus and that the state's proffered 'rational' reason was pretextual." Petition, p. 14 (quoting *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944-48 (9th Cir. 2004)). She criticizes the Fifth Circuit for *not* requiring Dr. Whiting to prove animus rather than simply a lack of

rationality. Dr. Whiting appears to want to replace this Court's objective *Olech* standard with a subjective one.

Regardless of Dr. Whiting's understanding, the Fifth Circuit correctly applied *Olech*. In *Olech*, this Court confirmed that a plaintiff need not show ill will or animus so long as she proves there is no rational basis for a difference in treatment among similarly situated persons. *Olech*, 528 U.S. at 564. (This, of course, assumes the equal protection claim is not based on membership in a protected class like race, religion, or gender).

The circuit court assumed *arguendo* that Dr. Whiting had met her burden of establishing different treatment of similarly situated individuals, and then determined whether there was no rational basis for the decision to deny tenure. *Whiting v. The University of Southern Mississippi*, 451 F.3d 339, 349 (5th Cir. 2006).[2] The Fifth Circuit correctly applied the rational basis test of *Olech* and did not "require proof of motive." In applying the rational basis test, however, the Fifth Circuit necessarily addressed Dr. Whiting's own allegation that the "rational reasons put forth by the defendants are no more than pretext for the underlying, irrational reason for her denial of tenure, i.e., President Thames's purported bias against her as a result of the ill will his daughter Dr. Thames, bore her." *Whiting,* 451 F.3d at 350.

The Fifth Circuit concluded that "[a]ll decisions were at least debatable, and none reveals a failure to exercise

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[2] Dr. Whiting misstates the Defendants' position by arguing that "the Defendants have conceded that they applied a different standard to Dr. Whiting than every other person who has been tenured and promoted." Petition, p. 8. The Defendants' position is better stated by the Fifth Circuit. *See Whiting v. The University of Southern Mississippi*, 451 F.3d 339, 349 (5th Cir. 2006).

professional judgment." *Id.* (quoting *Levi v. Univ. of Tex. at San Antonio*, 840 F.2d 277, 280 (5th Cir. 1988)). The circuit court did not require Dr. Whiting prove ill motive, ill will, or animus. Rather, the court necessarily considered whether there was evidence of ill will because of Dr. Whiting's own allegations that rational reasons given by the Defendants were a pretext for ill will and animus. The circuit court did not err in its analysis.

### B. There is no split of authority among the circuits with respect to *Olech*.

The survey of cases offered by Dr. Whiting as evidence of a split among circuits in interpreting *Olech* is protean and difficult to follow. But one thing is clear: Nowhere does Dr. Whiting show how the circuit court's decision creates a split among circuits regarding the application of *Olech*. As set out above, the circuit court correctly applied the rational basis test articulated in *Olech*, considering the issue of motive and ill will only because they were offered by Dr. Whiting as evidence of a lack of a rational basis for the University's alleged difference in treatment.

## II. Dr. Whiting had no property interest warranting due process protections.

Dr. Whiting's Complaint is vague with regard to whether she claimed a property interest in tenure and promotion, in the tenure and promotion procedures, or both. Regardless, Dr. Whiting has no federally protected property interest in either.

### A. Dr. Whiting has no federally protected property interest in a grant of tenure or promotion.

The "threshold requirement of any due process claim, be it substantive or procedural, is a showing that the government deprived the plaintiff of a liberty or property interest." *Pruett v. Dumas*, 914 F. Supp. 133, 137 (N.D. Miss. 1996) (citing *Moore v. Miss. Valley State Univ.*, 871 F.2d 545, 548 (5th Cir. 1989); *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir. 1988)). Unless a plaintiff can show deprivation of a protected liberty or property interest, "no right to due process can accrue." *Pruett*, 914 F. Supp. at 137.

#### 1. Under Mississippi law, Dr. Whiting, a non-tenured faculty member, has no property interest in obtaining a grant of tenure or promotion triggering federal protection.

Whether Dr. Whiting had a protected property interest entitling her to substantive or procedural due process in gaining tenure or promotion first depends on state law. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 566-67 (1972). Once a property interest is found to exist under state law, "federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 9 (1978).

In *Roth*, a non-tenured faculty member at a state university was employed under a one-year contract that was not renewed. 408 U.S. at 566-67 (1972). Roth was not provided a hearing to challenge the merits of the decision not to rehire him. Roth claimed he had a property interest

in being rehired and the state had deprived him of that property interest without due process. *Id.* at 568. This Court disagreed, finding Roth had no property interest triggering due process protection. *Id.*

In reaching its decision, the Court first looked to state law to determine whether a state employee has a property interest in his or her job. *Id.* at 577. Under Wisconsin law, Roth had no protected property interest in being re-employed with the university. Roth – a non-tenured professor – was statutorily entitled to nothing beyond his one-year appointment. *Id.* at 577.

Here, whether Dr. Whiting has a protected property interest entitling her to substantive or procedural due process in gaining tenure or promotion depends first on Mississippi law. The Mississippi Supreme Court has consistently said a non-tenured professor has no property interest in continued employment. In *Wicks v. Mississippi Valley State University*, 536 So.2d 20, 23 (Miss. 1988), Dr. David Wicks, a professor of history and social studies at Mississippi Valley State University, applied for tenure in 1983. The president of the university, after reviewing the recommendations resulting from the tenure process, decided to deny tenure to Dr. Wicks based on lack of credentials in the teaching field. *Id.* Dr. Wicks filed suit alleging due process violations.

Relying on *Roth*, the Mississippi Supreme Court, as part of the first step in its due process analysis, examined Mississippi law to determine if Dr. Wicks had a property interest warranting due process protections. *Id.* at 22. The Supreme Court determined that Miss. Code Ann. § 37-101-15, setting forth the general powers and duties of the Board of Trustees of the State Institutions of Higher

Learning, and subsections 37-101-15(b) and (f), granting authority to the Board of Trustees for general supervision of all matters incident to the proper functioning of universities and for the employment of professors, do "not create a legitimate expectation of continued employment for a non-tenured employee." *Wicks*, 536 So.2d at 22. "There is no property interest in the grant of tenure." *Id.* at 20.

Although the University has a written tenure policy, the policy does not give Dr. Whiting a property interest in actually obtaining tenure: "No protected interest is created by a state rule or regulation which in no substantive way limits by particularized standards the discretion of the administrator." *Id.* at 23 (citing *Olim v. Wakinekona*, 461 U.S. 238 (1982)). The president's discretionary decision to recommend tenure was not restricted by mandatory language like "shall" or "must," reflecting the principle that "the President is allowed to determine what is best for the University." *Id.* Although "Wicks was unhappy with the way that the University exercised its discretion, but that does not create in him a protected property interest." *Id.* at 23-24 (quoting *Staheli v. Univ. of Miss.*, 854 F.2d 121, 125 (5th Cir. 1988)). "As held in *Roth*, a non-tenured college teacher has no constitutionally protected property interest in his job." *Id.* at 23.

Later, the Mississippi Supreme Court affirmed *Wicks*' holding. In *Hall v. Board of Trustees of State Institutions of Higher Learning*, 712 So.2d 312 (Miss. 1998), Hall, a professor at the University of Mississippi Medical Center, had not been granted tenure by the faculty or the Board. "Therefore, Dr. Hall did not have a legitimate expectation of, nor entitlement to, continued employment at UMC, and furthermore, the renewal of Dr. Hall's contract was subject to approval of the Board." *Id.* at 321. Dr. Hall, therefore,

"did not have a protected property interest in his employment at UMC, and thus, he is not entitled to substantive protection under the due process clause as the result of the arbitrary deprivation by government action of a protected property interest." *Id.*

The point of tenure is to give tenured professors – not professors without tenure – some assurance of continuing employment. This is the point made by the Mississippi Supreme Court in *Wicks*:

> The whole purpose of the distinction between tenured and non-tenured faculty was to give the University discretion over the employment of non-tenured teachers. . . . The institution of tenure has an inexorable internal logic: **the very existence of a tenure system means that those teachers without tenure are not assured of continuing employment**. *See Board of Regents v. Roth*, *supra*, (non-tenured college teacher had no constitutionally protected property interest in his job).

*Wicks*, 536 So.2d at 23 (quoting *Staheli v. Univ. of Miss.*, 854 F.2d 121, 125 (5th Cir. 1988) (emphasis added)).

*Wicks* and *Hall* confirm that the statutory framework governing university employment and the Policies and Bylaws of the Board of Trustees do not create a legitimate expectation of continued employment for a non-tenured faculty member. Central to the Mississippi Supreme Court's reasoning in these cases is the discretion left to Mississippi's university presidents in deciding to award or deny tenure and promotion and in the Board of Trustees' ultimate authority to approve presidential recommendations. "It shall be the policy of the board to permit the executive head of each institution to nominate for election by the board all subordinate employees of the institution

over which he presides." Miss. Code Ann. § 37-101-15(f). The actions of the faculty and various committees below the level of President are advisory only, as indicated by the word "recommendations." They do not bind the President or otherwise limit him from exercising his discretion in deciding whether to recommend a faculty member to the Board of Trustees for tenure. *Wicks*, 536 So.2d at 23.

The Board Policies and Bylaws define tenure as "continuing employment that may be granted to a faculty member after a probationary period upon nomination by the Institutional Executive Officer for election by the Board." R. 169. The President's decision is the final decision for the University, unless appealed to the Board of Trustees. R. 173. Furthermore, "Board approval shall be *required* for the award of tenure." R. 168. "The award of tenure is not vested until notice of the award is given in writing by the Institutional Executive Officer, *after approval by the Board*, and the written notice is actually received by the faculty member." R. 169 (emphasis added). A candidate simply cannot create a property right to tenure or promotion simply through his or her subjective expectation of tenure or promotion.

The Faculty Handbook also shows that Dr. Whiting had no legitimate expectation of continued employment. The Faculty Handbook defines tenure as "a status that is granted to college and university faculty members *after a probationary period in the profession*. It protects them against involuntary suspension or termination of employment except upon stipulated grounds and in accordance with specified procedures." R. 171 (emphasis added). In other words, faculty who have not obtained tenure do not enjoy the protections of tenure.

Dr. Whiting essentially argues for "pre-tenure tenure." But Mississippi law is clear: "A non-tenured college teacher has no constitutionally protected property interest in his job." *Wicks*, 536 So.2d at 23. The tenure policies of the University do not "create or confer an expectation of continued employment." *Id.* at 23. If they did, "the University will have received powerful incentives to make its tenure policy less specific and therefore less helpful to [faculty] seeking to discern and fulfill the requirements for tenure." *Id.* at 24 (quoting *Staheli*, 854 F.2d at 126). "Whatever actual expectations [Dr. Whiting] may have had, they cannot be constitutionally baptized a 'legitimate claim of entitlement' to permanent employment." *Id.* Dr. Whiting does not have a property interest triggering due process protections, and her federal due process claims were, therefore, appropriately dismissed.

**2. Just as Dr. Whiting has no property interest in tenure or promotion, she has no property interest in the University's tenure and promotion procedures themselves.**

Although *Wicks* and *Hall* confirm that a non-tenured faculty member has no property interest in tenure or promotion, Dr. Whiting attempts to circumvent these cases by claiming the University's written tenure and promotion policy contained in its Faculty Handbook are part of her one-year contract, providing procedural rights that warrant federal due process protections. But Dr. Whiting never accounts for the fact that in *Wicks* and *Hall* the Mississippi Supreme Court was construing *written* tenure policies promulgated by the Board of Trustees of State Institutions of Higher Learning – the same board that promulgated the

policy at issue in this case. In *Wicks* and *Hall,* the Mississippi Supreme Court held that the written tenure policies of two of Mississippi's public universities (Mississippi Valley State University and The University of Mississippi, respectively) did not afford due process protections. Nevertheless, Dr. Whiting contends the procedures entitle her to special due process protections Mississippi's highest court has never before discovered. This is not so.

The University does not dispute that its Faculty Handbook may well become part of an employment contract, according to the Mississippi Supreme Court's holding in *Robinson v. Board of Trustees*, 477 So.2d 1352 (Miss. 1985). But even if the tenure and promotion procedures became part of the non-tenured employment contract Dr. Whiting held while applying for a tenured position, this does not mean the procedures are a right protected by the federal constitution. As explained above, the determination of whether there is a property interest protected by federal law is a two-step inquiry. Assuming Dr. Whiting has satisfied the first step – that the procedures are part of a contract in which she has a property interest – she must then satisfy the second step: whether under "federal constitutional law . . . that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 9 (1978).

Federal courts answering this question have repeatedly held that unless a public employee has a legitimate property right to an employment position, the procedures used in evaluating his or her suitability for the position do not create property rights protected by the due process clause of the Federal Constitution. According to the Fifth Circuit: "The existence of such procedures cannot be used as a bootstrap to aid the finding of an entitlement." *Evans v. City of Dallas*,

861 F.2d 846, 850 (5th Cir. 1988) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)).

In *Mumford v. Godfried*, 52 F.3d 756, 759 (8th Cir. 1995), Mumford, a university professor, brought an action against a state university and faculty administrators alleging he was wrongfully denied tenure. He focused on the language in the university's faculty handbook regarding procedures to be followed by each department in making tenure decisions. *Id.* Mumford argued that the university's "written rules governing tenure decisions 'constitute an integral part of the contractual structure defining the employment relationship and, thus constitute a valid contract.'" *Id.* Because he had a contractual right to have certain procedures followed, Mumford argued, he also had a property interest in those procedures triggering due process protections. *Id.* The Eighth Circuit disagreed "for the simple reason that a contractual right to have certain procedures followed does *not* create a property interest in the procedures themselves." *Id.* (emphasis in original). The district court's summary judgment dismissal of Mumford's due process claim was therefore affirmed.

Other courts agree that employment procedures do not give rise to federally protected due process interests: "There is neither a 'liberty' nor a 'property' interest in procedures themselves." *Fleury v. Clayton*, 847 F.2d 1229, 1231 (7th Cir. 1988) (citing *Olim v. Wakinekona*, 461 U.S. 238, 248-51 (1983)); *see also Richardson v. Township of Brady*, 218 F.3d 508, 518 (6th Cir. 2000) (holding that the plaintiff "can have no protected property interest in the procedure itself"); *Bautista v. Crowley*, 108 F.3d 1384, 1384, 1997 WL 120827 (9th Cir. 1997) (unpublished) (holding that alleged failure of university to follow employment procedures is not a violation of due process,

because "this approach mistakes the 'procedure' with the 'right' being protected. To recognize a constitutionally protected interest in the procedures themselves . . . would stand the due process analysis on its head. . . . Appellant cannot have a property interest in process alone.") (citations omitted)); *Batra v. Bd. of Regents of The Univ. of Nebraska*, 79 F.3d 717, 720 (8th Cir. 1996) ("The University's alleged failure to follow its own procedural rules and regulations did not, without more, give rise to a protected liberty or property interest."); *Dube v. The State Univ. of New York*, 900 F.2d 587, 599 (2d Cir. 1990) ("Based on the record before us, which indicates only that Dube was entitled to be considered for tenure in accordance with established contractual procedures, we conclude that Dube has failed to meet the threshold requirement of establishing a protected 'liberty' or 'property' interest."); *Campbell v. City of Champaign*, 940 F.2d 1111, 1113 (7th Cir. 1991) ("[A] contract which merely creates a right to specified procedures does not create an entitlement upon which a claim of deprivation of property without due process of law can be founded. . . . When the claimed deprivation of property is the loss of a job, the entitlement must be to a job, rather than just to a set of disciplinary procedures.").[3]

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[3] Here, the lack of a property interest in the procedures themselves is enhanced because the ultimate decision regarding tenure and promotion is made by the president and is discretionary. *See Bautista v. Crowley*, 108 F.3d 1384, 1384, 1997 WL 120827 (9th Cir. 1997) (unpublished) ("Nothing in the Department's evaluation criteria creates an expectation of entitlement to a high performance rating. To the contrary, they reserve a significant measure of discretion to UNR decision makers."); *Clemente v. United States*, 766 F.2d 1358, 1365 (9th Cir. 1985) ("If the procedures required pose no significant limitation on the discretion of the decision maker, the expectation of a specific decision is not enhanced enough to establish a constitutionally protected interest in the

(Continued on following page)

No matter how Dr. Whiting tries to characterize her claim, as a matter of law, she has no property interest protected by due process.

### B. Because the circuit court assumed the existence of a property right for its analysis, no property right was "ignored."

In analyzing her due process claims, the Fifth Circuit first rejected Dr. Whiting's argument that she had an "expectation of continued employment sufficient to generate a protected property interest." *Id.* at 344-45. The Fifth Circuit also rejected Whiting's claims that positive performance reviews (either annual evaluations or a third-year review) were sufficient to generate a property interest in tenure. *Id.* (citing *Wicks*, 536 So.2d at 24). According to the Fifth Circuit:

> Language in the Faculty Handbook ... consistently reiterates that promotion and tenure are not guaranteed, even by positive performance reviews: the Handbook states, for example, "[p]romotion in academic rank is not guaranteed by contracted employment or earned solely by the duration of employment" and "[t]he privilege of tenure is not guaranteed by tenure-track appointment, by prior academic rank, or by duration of employment." Further, as the district court noted: "the same faculty handbook reiterates that, notwithstanding the

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procedures.")). As set out above, the Mississippi Supreme Court has confirmed the discretion of university presidents in making tenure and promotion decisions: "It is well recognized that the final decision to grant tenure lies with the President, and the grant of tenure is discretionary. The President is allowed to determine what is best for the University." *Wicks*, 536 So.2d at 23.

> procedures, tenure is awarded at the discretion of the board of trustees upon nomination by the president." Given such language and existing state law precedent, we cannot construe an expectation of continued employment sufficient to generate a protected property interest.

*Whiting*, 451 F.3d at 345.

According to the Fifth Circuit, "Where a tenure policy exists, non-tenured university employees under Mississippi law do not have a property interest in their continued employment that warrants protection under the due process clause." *Id.*

This determination was entirely consistent with the district court's earlier ruling that "the procedures set out in the faculty handbook" do not perform "the necessary alchemy of transforming her expectations into protectable interests. That argument in my opinion founders . . . because the same faculty handbook reiterates that, notwithstanding the procedures, tenure is awarded at the discretion of the board of trustees upon nomination by the president." (*See* Exhibit "A," to Appellees' Brief, Excerpt of Transcript of Hearing).

The Fifth Circuit then determined whether "some other property interest in a benefit afforded by her current contract with the state university" could give rise to a protected property interest. *Whiting,* 451 F.3d at 345. The court acknowledged that in Mississippi an employee manual becomes part of an employment contract, "creating contract rights to which employers may be held, such as Dr. Whiting's right to the procedures outlined in the handbooks." *Id.* at 13 (citing *Robinson v. Bd. of Trustees,* 477 So.2d 1352, 1353 (Miss. 1985); *Bobbitt v. The Orchard Dev. Co.*, 603 So.2d 356,

361 (Miss. 1992)). But the court did not conclude that Dr. Whiting's contractual rights were sufficient to give rise to a property interest warranting due process protection under federal law – the second step in the inquiry.

Instead, showing deference to Dr. Whiting, the Fifth Circuit *assumed* the existence of that right for purposes of its analysis: "However, even if Dr. Whiting's contractual rights are sufficient to constitute a property interest warranting due process protection, it is not clear she has adequately alleged any sort of deprivation." *Whiting*, 451 F.3d at 346. The court then examined each alleged breach of the Faculty Handbook: (1) the timeliness of the decision regarding promotion and tenure, (2) the fact that Dr. Whiting was not granted tenure despite the positive evaluations, and (3) the idea that Dr. Whiting was entitled to *de facto* or automatic tenure in light of the annual and third-year evaluations. *Id.*

The Fifth Circuit ultimately concluded that these alleged breaches of the tenure and promotion procedures did not "establish a genuine question of material fact as to whether she has been deprived of any property interest. Accordingly, her due process clause claims, both substantive and procedural, fail insofar as they are based on deprivation of a property interest." *Id.*

Dr. Whiting claims the court ignored her protected property interest. But the circuit court assumed the existence of the property interest for purposes of its due process analysis, ultimately concluding that no due process violation occurred even if Dr. Whiting had a property interest. The issue, then, of whether the circuit court erred in its determination that Dr. Whiting did not have a property interest protected by federal law is moot.

## II. Dr. Whiting offered no proof of a biased decision maker.

Dr. Whiting claims President Shelby Thames was biased in making his decision regarding her tenure and promotion application because of 1) the lawsuit Dr. Whiting had earlier filed against him and 2) the alleged animosity between Dr. Whiting and President Thames' daughter, Dr. Dana Thames, the Chair of the Department in which Dr. Whiting worked.

There is no evidence that President Thames' decision was motivated or informed by constitutionally impermissible motives. *See Whiting*, 451 F.3d at 351. The President reviews *de novo* all recommendations arising from departmental, college, and Provost or vice presidential levels. R. 482, 449, Excerpts of Faculty Handbook, § XI (22), § XI (3.3). President Thames swore in his affidavit that, before making his decision, he never discussed Dr. Whiting's tenure and promotion application with his daughter, Dr. Dana Thames. R. 612-13. President Thames based his decision not to award tenure on his own careful and independent review of Dr. Whiting's dossier. *Id.* The basis of his decision – that Dr. Whiting had not sufficiently complied with the publication requirement for tenure and promotion – is constitutionally permissible. *Krystek v. The University of Southern Mississippi*, 164 F.3d 251, 253-54 (5th Cir. 1999); *Wicks,* 536 So.2d at 20-22. Dr. Whiting offers no proof to rebut President Thames' testimony.[4]

[4] In fact, the basis of President Thames' decision as set out in his affidavit testimony is ignored by Dr. Whiting who says, in her Petition, that "Shelby Thames provided no rationale for his decision. He referred to not one iota of some deficiency regarding Dr. Whiting's performance." Petition, p. 7.

## CONCLUSION

All Defendants respectfully request the petition be denied. Dr. Whiting cannot maintain her claims under federal law because she 1) has no property interest in tenure or promotion (or in the procedures regarding tenure or promotion); 2) has not demonstrated a misapplication of this Court's jurisprudence regarding her "class-of-one" equal protection claim; and 3) has not rebutted the testimony of the University's president showing a rational, constitutionally permissible basis for his decision denying tenure and promotion.

Respectfully submitted,

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